No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

RUSSELL F. MANFREDI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

I. **Whether criminal defendant can be inculpated with the results of a compulsory psychiatric examination he was forced to undergo before he gave notice of his intent to present a mental-status defense or otherwise knowingly waived his Fifth Amendment privilege not to submit to that examination?**

II. **Whether a prosecutor's affirmative use of the results of a compulsory psychiatric examination to prove an element of the charged offense which the defendant has not contested with mental-status evidence of his own violates the defendant's privilege against self-incrimination?**

III. **Whether a compulsory psychiatric examination is a "critical stage" of a criminal prosecution at which the presence of counsel is required to protect the defendant's right to a fair trial?**

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v.

STATE OF CONNECTICUT, *Respondent*

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The petitioner, Russell F. Manfredi, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court for the State of Connecticut.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 213 Conn. 500, 569 A.2d 506 (1990) and is reprinted in the appendix hereto, p. 1A, *infra*. The opinion of the Connecticut Appellate Court is reported at 17 Conn.App. 602, 555 A.2d 436 (1989) and is reprinted in the appendix hereto, p. 1B, *infra*.

JURISDICTION

The judgment of the the Connecticut Appellate Court affirming the petitioner's conviction for manslaughter in the first degree, was entered on March 7, 1989. A motion for rehearing was denied on April 6, 1989.

A petition for certification was granted thereafter by the Connecticut Supreme Court which, on January 30, 1990, affirmed the judgment of the Connecticut Appellate Court.

A timely motion for reargument was filed in the Connecticut Supreme Court on February 9, 1990, and was denied by written order on March 1, 1990. (Pet.App. C).

This Petition For Certiorari is being docketed within 90 days from the denial of the rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

The constitutional, statutory and practice book provisions involved in this case, which are printed verbatim in Appendix D, *infra*, include: The Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Sections 53a-13 and 53a-54a of the Connecticut General Statutes; and Sections 758-762, 811, 852 and 2000 of the Connecticut Practice Book.

STATEMENT OF THE CASE

Trial Court Proceedings

On August 4, 1986, the petitioner was brought to trial before a jury in the Hartford (Connecticut) Superior Court on the charge of murder, under C.G.S. §53a-54a, in connection with the March 8, 1985 death of his wife Catherine in their West Hartford home. At trial, the state sought to prove that the petitioner had intentionally killed his wife by striking her on the head with a blunt, square-edged object, then attempted to cover up his crime by dropping her out a bedroom window, placing her in her car, and driving her to the entrance of a nearby park, where he left her after staging an auto accident.

The petitioner admitted that he had killed his wife in the bedroom of their home, but testified that he had not

done so intentionally. Rather, he explained that he hit his wife with an aluminum baseball bat while trying to keep her from lunging at him after he wrestled the bat away from her when she attacked him with it at the end of a tense, night-long argument about personal and family problems. He further admitted that after he hit his wife and she died in his arms, he lowered her out the window, drove off with her in the car, and left her by the park so that their three young sons, all of whom were home at the time, wouldn't see her and realize what he had done.

In addition to denying that he intended to kill his wife when he hit her with the bat, the petitioner presented two affirmative defenses: first, under C.G.S. §53a-54a(a), that he had acted under an extreme emotional disturbance for which there was a reasonable explanation or excuse; and second, under C.G.S. §53a-13, that he had been unable to conform his conduct to the requirements of law because of a mental disease or defect. He supported these mental-status defenses with expert psychiatric testimony from Dr. Walter Borden, who testified that at the moment he struck and killed his wife, the petitioner was suffering from a catathymic crisis which was triggered when his wife hit him with the bat. This assault, he explained, caused the petitioner to associate his wife's actions with those of others who had humiliated him as a child. As a result, he lost all control over his feelings and actions towards her and struck her, acting directly contrary to his own conscious thinking and values.

The state countered the petitioner's claims of insanity and extreme emotional disturbance with expert testimony from Dr. Peter Zeman, a psychiatrist, and Dr. Anne-Marie Phillips, a psychologist. Drs. Zeman and Phillips had, over repeated defense objections,[1] examined the petitioner in the

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[1] These objections are fully and accurately recounted in the Connecticut Appellate Court's opinion. *State v. Manfredi* (I), 17 Conn. App. 602, 607-11, hereinafter referenced in Petitioner's Appendix B, at pp. 6B-10B.

absence of his counsel eight and two times respectively, for a combined total of seventeen hours, before he gave notice or could lawfully have been required to give notice of his intent to rely upon such defenses at trial.[2] The state had sought permission to conduct these examinations less than three weeks after the petitioner's arrest, and nearly two months before he would formally be charged with murder, claiming that such examinations should be conducted "as soon as possible" to enable the state to rebut any mental-status defense the petitioner might later present. It argued, under C.P.B. §760, that this was an "appropriate case" in which to order such examinations since in view of the strength of its case and its awareness that the petitioner was seeing a psychiatrist, the only defenses it could foresee were mental-status defenses. (App., B8, B15).

The petitioner, who had been treated by a psychiatrist for depression in the wake of his wife's death and had introduced letters and brief testimony from psychiatrists in support of his requests for permission to see his children and to be released on bond to enter a psychiatric facility,[3] objected to the state's motion on grounds that no decision had yet been made whether or not to assert a mental-status defense at trial. Even so, the trial court ordered the examinations to allow the state "to see where it was going with its case." (App. 6A).

Shortly after the examinations were ordered, defense counsel moved for a protective order to limit their substan-

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[2] Under Connecticut Practice Book §§758, 759 and 811 (App. 3D-7D), a criminal defendant must file a notice of his intent to present either a mental-status defense or expert testimony relating to a mental disease or defect within ten days of the entry of a plea, unless the trial judge, for good cause, extends the time for filing such notice.

[3] In its opinion, the Appellate Court accurately describes the petitioner's limited use of expert psychiatric testimony to secure his release on bond, and later reliance on psychiatrists' letters in support of his request to see his children. *See* App. B4-5, B13-14, *infra.*

tive scope and to ensure that he, as counsel, could accompany the petitioner to them.[4] This motion, which was based on the petitioner's Sixth and Fourteenth Amendment right to counsel, was denied. (App., A5).

One year after the petitioner was formally charged with murder, and after he had given formal notice of his intent to rely on the defenses of extreme emotional disturbance and insanity and to present expert testimony in support thereof, the state sought and was granted permission to have Dr. Zeman conduct additional psychiatric interviews of the petitioner, again without counsel. In two subsequent interviews, Dr. Zeman covered no new ground, but merely asked the petitioner if he had anything to add to or change in what he had told the doctor one year before. According to Dr. Zeman, the petitioner reported that he had nothing to add to his prior account.[5] On the basis of these two postnotice examinations, which the trial court found to have been properly ordered and to have elicited the same information as was elicited in the prenotice examinations, the trial judge rejected the petitioner's claim that Dr. Zeman's testimony should be suppressed. Drs. Zeman and Phillips were thus allowed to testify to their shared conclusion that the petitioner, though extremely agitated on the evening in question, was not laboring under a mental disease or defect when he struck and killed his wife.

In his requests to charge the jury, the petitioner, consistent with his pretrial notices, expressly asked that the jury be told not to use the testimony of his own expert for any purpose other than considering his defenses of insanity and extreme emotional disturbance. Instead, the trial judge

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[4] The petitioner's motion for a protective order and the trial court's hearing thereon are described in the Appellate Court's opinion. *See* App., 7B-8B.

[5] Dr. Zeman's relevant testimony on the petitioner's motion to suppress is set forth in the Appellate Court's opinion. *See* App., 18B-19B, n.13.

instructed the jury that all the psychiatric expert testimony *must* be considered both on the petitioner's mental-status defenses and on the issue of intent to kill.[6]

On November 4, 1986, the petitioner was found guilty of the lesser-included offense of manslaughter in the first degree with extreme emotional disturbance, under C.G.S. §53a-55(a)(2).

Appellate Court Proceedings

After being sentenced to twenty years imprisonment, the petitioner appealed his conviction to the Connecticut Appellate Court, which, on March 7, 1989, found no error and upheld the conviction. (App. B).

On his appeal, the petitioner briefed and argued, *inter alia*, the following claims of error: (1) that the trial court violated his Fifth and Fourteenth Amendment privilege against self-incrimination by compelling him to submit to pretrial psychiatric examinations before he had placed his mental status in issue or otherwise validly waived the privilege, and by allowing the state to incriminate him with the results of those examinations; (2) that the trial court violated his Fifth, Sixth and Fourteenth Amendment privilege against self-incrimination and right to present a defense by charging his jury that they were to use defense and prosecution psychiatric expert testimony on the contested issue of intent to kill -- an essential element of the crime of manslaughter under General Statutes §53a-55(a)(2) -- even though such testimony had been introduced solely to support or rebut his mental-status defenses; and (3) that the trial court violated his Sixth and Fourteenth Amendment right to counsel by denying his request that his counsel be present at the challenged psychiatric examinations.

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[6] *See* Appendix E for relevant portions of petitioner's request to charge and relevant excerpts of the trial court's instructions.

In rejecting the petitioner's first claim of error, the Appellate Court first agreed with the petitioner that the trial court had violated his Fifth and Fourteenth Amendment privilege against self-incrimination by compelling him to submit to psychiatric examinations before he had validly waived his privilege by placing his mental status in issue. (App. 15B). Declaring that "the constitutionality of a compulsory psychiatric examination ... depends upon whether the defendant ha[s] placed his mental status in issue," (App. 11B),[7] the Court found that in this case the petitioner had *not* placed his mental status in issue by the time of the challenged examinations were ordered and conducted because he had filed no written notice of intent to rely on mental-status defenses or to present expert psychiatric testimony at trial, under C.P.B. §§758 or 759, and had not otherwise clearly manifested an intention to place his mental status in issue at trial. (App., 12B-13B).[8]

Despite its finding that the prenotice examinations by the state's experts were unconstitutional, the Appellate Court ruled that the admission of their testimony was harmless error. The Court reasoned that since the experts' testimony was based on two identical sets of data -- the first unlawfully obtained before notice was given, the second law-

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[7] Rejecting as inappropriate speculation the state's suggestion that the strength of its case and the fact of the petitioner's post-arrest hospitalization made insanity and extreme emotional disturbance the only foreseeable defenses available to the petitioner, the Appellate Court declared: "The constitutional requirement that a defendant must first place his mental status in issue by asserting the defenses of insanity or extreme emotional disturbance before he may be compelled to submit to a psychiatric examination is not a requirement that can rest on prosecutorial speculation." (App., 15B).

[8] The Appellate Court flatly rejected the state's contention, made for the first time on appeal, that the petitioner's presentation of expert psychiatric evidence concerning his emotional state and need for temporary hospitalization upon his release from custody constituted notice that he intended to place his mental status in issue at trial. Indeed, such evidence related only to the issues of bond and his request to see his children. (App., 13B-14B).

fully obtained thereafter -- the unlawful portion brought nothing to the jury's attention that was not otherwise properly before them. On that basis, it held that in the absence of any other proven misuse of the results of the unconstitutional examinations, the admission of the state's expert testimony did not entitle the petitioner to a new trial.[9]

The Appellate Court refused to reach the merits of the petitioner's second claim of error because he had not excepted to the trial court's charge. (App., 20B). Ignoring long-standing Connecticut case-law and Practice Book authority holding that claimed errors in jury instructions can be preserved either by requests to charge or by exceptions to the charge, and failing to acknowledge either the petitioner's pertinent requests to charge or the state's failure to contest this claim on reviewability grounds, the Court declined review under Connecticut's plain error rule and the doctrine of *State v. Evans*, 165 Conn. 61, 70 (1973), under which unpreserved constitutional claims are reviewable whenever "the record adequately [demonstrates that the defendant] has clearly been deprived of a fundamental constitutional right and a fair trial."

In rejecting the petitioner's claim that he had a Sixth and Fourteenth Amendment right to the presence of counsel at his court-ordered psychiatric examinations, the Appellate Court expressly relied on the D.C. Circuit's denial

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[9] The Appellate Court construed the trial court's finding "that the postnotice examinations did not elicit any information different from the prenotice examinations", (App., 16B), as a "ruling that the postnotice examinations were not impermissibly tainted by the prenotice examinations". (App., 19B). The Court then held that this "ruling" was not clearly erroneous since the record did not demonstrate any "substantive difference" between the results of the pre- and post-notice examinations. *Id.* Concluding that "it [was] impossible to distinguish between the unconstitutional testimony ... obtained from the defendant [during the prenotice examinations], and the constitutional testimony obtained from [him during the postnotice examinations]," *id.*, the Appellate Court held that admission of the unconstitutional portion of Dr. Zeman's testimony was at most a harmless error.

of a similar claim in *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984), its own recent decision in *State v. Johnson*, 14 Conn. App. 586, 588-95 (1988)(following *Byers*), and dictum from this Court's opinion in *Estelle v. Smith*, 451 U.S. 454 (1981)(App.B). Quoting *Byers* for the proposition that this Court in *Estelle* had "specifically disavowed any implication of a 'constitutional right to have counsel actually present *during* the examination ..[,]' [*id.*,] 470, n.14 [,]" (App., 24B)(*quoting Byers, supra*, 1119), the Appellate Court refused to extend such a right for two reasons: first, even the silent presence of an attorney in or near the examining room would distract the defendant and disrupt the examination; and second, counsel's "presence in such an observational capacity, without ability to advise, suggest or object, would have no relationship to the [S]ixth [A]mendment's [guarantee to the assistance of counsel].'" (App., 24B-25B)(*quoting Byers, supra*, 1120).

Petition for Certification

After unsuccessfully seeking reargument as to each of the above-described claims, the petitioner filed a timely Petition For Certification with the Connecticut Supreme Court, requesting it to review the Appellate Court's disposition of each of the above-described claims. Petition for Certification ("P.C.", 1). In support of his Petition, the petitioner presented the following arguments. As to his first claim of error, he argued that the Appellate Court's finding of harmless error was erroneous, since in this case the state could not satisfy its constitutional duty, imposed by this Court's binding Fifth Amendment precedents, of proving that the state's expert testimony derived from a "legitimate source wholly independent of the compelled [examinations.]'" P.C., 7 (*quoting Kastigar v. United States*, 406 U.S. 441,

460 (1971)).[10]

As to his second claim of error, the petitioner argued, *inter alia*, that the Appellate Court should have decided it on the merits since it had properly been preserved by two timely requests to charge and was, in any event, reviewable under *State v. Evans*, *supra*, because the record clearly demonstrated that the challenged instruction violated his privilege against self-incrimination, as articulated in *Estelle v. Smith*, *supra*, and his right to a fair trial. P.C., 7-8.

As to his third claim of error, the petitioner argued that certification should be granted because the Appellate Court's holding was based on a misreading of this Court's decisions in *United States v. Wade*, 388 U.S. 218 (1967), and *United States v. Ash*, 413 U.S. 300 (1973). More specifically, he urged the Connecticut Supreme Court to reject the Appellate Court's holding in *State v. Johnson*, *supra*, on which its decision in this case was based, that the Sixth Amendment right to counsel does not arise in any pretrial proceeding at which the accused is not "required to make a decision requiring distinctively legal advice" or put in a situation where he "must defend himself against the direct onslaught of the prosecutor." *Id.*, 590. *Ash*, he argued, "did *not* condition the right to counsel at a pretrial stage of the prosecution *either* on the presence of a prosecution *or* on the active nature of counsel's anticipated role *during* the confrontation in question." P.C., 9 (emphasis in original). Rather, he argued, "the proper inquiry is whether the presence of counsel is necessary to ensure

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[10] All of Dr. Phillips' testimony, he argued, was based on her illegal prenotice examinations of the petitioner; Dr. Zeman's testimony was based principally on Dr. Phillips' illegal examinations and his own illegal prenotice examinations of the petitioner; and Dr. Zeman's "two postnotice examinations were themselves the tainted fruit of the illegal prenotice examinations, since they incorporated the latter by reference" and had no independent content of their own. P.C., 5-7 (*citing Wong Sun v. United States*, 371 U.S. 471 (1963)).

the petitioner's right to a fair trial." *Id.*, 10.[11]

The Petition For Certification was granted, with review limited to the following question:

> Did the Appellate Court err in sustaining the admission of expert psychiatric testimony elicited by the state in advance of the filing of a notice of intent to rely on a defense of mental disease or defect?

Supreme Court Proceedings

In his argument before the Connecticut Supreme Court, the petitioner reasserted his claims raised before the Appellate Court, that under *Miranda v. Arizona*, 384 U.S. 436 (1966), *Estelle v. Smith*, *supra*, and *Buchanan v. Kentucky*, 483 U.S. 402 (1987), a criminal defendant may not constitutionally be compelled to submit to examination by a state's psychiatrist unless he first knowingly waives his privilege against self-incrimination and that the petitioner here had not done so.

In answering the single question it certified, the Connecticut Supreme Court, with one justice concurring in the result but disagreeing with the constitutional analysis, rejected the Appellate Court's determination that the trial court had violated the petitioner's Fifth and Fourteenth Amendment privilege against self-incrimination by ordering him to submit to compulsory psychiatric examinations before he had placed his mental status in issue or otherwise waived his privilege. (App. A, *infra*). The crux of the Supreme Court's ruling was that whether or not a defendant has

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[11] Analogizing a pretrial psychiatric examination to a pretrial lineup, since both are proceedings in which the defendant is present and each, "if unmonitored, carries with it certain contextual risks of unfairness to the accused which the prosecution may use to the defendant's detriment ... at trial[,]" the petitioner urged the Supreme Court to find that the examination, like a lineup, is a critical stage of the prosecution at which the right to counsel attaches. *Id.*, 10-11.

given notice of his intent to rely on a mental-status defense or presented evidence in support of such a defense, the Fifth Amendment does not bar an examination if the defendant's actions give the trial court "reasonable grounds to find that the defendant's mental status *might* be an issue in the case, and to conclude that a psychiatric examination would be essential to the state's ability to respond intelligently to a mental status defense." (App., 16A; emphasis added).[12] Applying this analysis, the Supreme Court upheld the challenged examinations without first finding that the petitioner had knowingly, intelligently and voluntarily waived his right not to submit to them, finding instead that the petitioner could lawfully be examined because, five days after his wife's death, he had presented psychiatric testimony concerning his current emotional condition and immediate need for temporary hospitalization at a hearing relating solely to bond.

REASONS FOR GRANTING THE WRIT

I. The decision below that waiver of the right not to submit to a compulsory psychiatric examination can be predicated on acts which fail to manifest a clear intent to present a mental-status defense at trial conflicts with decisions of this Court.

The Connecticut Supreme Court based its rejection of the petitioner's claim that his privilege against self-incrimination was violated by the introduction of rebuttal testimony from the state's psychiatric experts on a finding that he had waived his self-incrimination privilege by placing "his

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[12] In so ruling, the Supreme Court observed that this Court has never addressed the question as to whether a defendant can "place[] his mental status in issue, thereby waiving his privilege against self-incrimination, even though he has not yet formally filed notice of intent to rely on a mental status defense." (App., 15A).

mental status in issue" before he was forced to submit to the psychiatric examinations on which their testimony was based. That finding, in turn, was predicated on the fact that the petitioner had presented brief testimony from one psychiatrist and letters from two psychiatrists on the limited questions of bond and renewed contact with his children within two weeks of his arrest.[13] The petitioner's reliance on psychiatrists for these purposes, the Court ruled, constituted a waiver of his right not to submit to compelled psychiatric examination as to his mental status at the time of his wife's death because it gave the trial court "reasonable grounds to find that the defendant's mental state *might* be an issue in the case, and to concluded that a psychiatric examination would be essential to the state's ability to respond intelligently to a mental status defense." (App. 14A; emphasis added).[14]

This ruling raises serious questions about the circumstances in which a criminal defendant can lawfully be compelled to submit to a psychiatric examination by the state's expert witnesses in order to enable the state to prepare to meet any mental-status defenses he might later interpose at trial. Unless this Court is prepared to abandon a long line of precedent in which it has clearly established that such an examination must be preceded or accompanied by a knowing, intelligent waiver of the privilege against self-

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[13] At no time during any stage of the proceedings below did the state contend that the defendant had placed his mental status in issue, and indeed, in its Brief to the Connecticut Supreme Court, it explicitly conceded the contrary. (State's Brief to Connecticut Supreme Court, p. 15).

[14] It was uncontested below that the state had no need or interest in securing access to the defendant for purposes of rebutting his positions as to bond. First, the state did not request the examinations for this purpose at trial; second, the court-order requiring the defendant to submit to the proposed examinations was made *after* a decision on bond had been made; and third, the trial court expressly made its ruling wholly without limitation -- the state could examine the defendant, the court said, so that it "could see where it was going with the case."

incrimination, it should review the Connecticut Supreme Court's decision and firmly reject the novel analysis on which it was based.

Under *Estelle v. Smith, supra*, and its progeny, this Court has consistently held that a compulsory psychiatric examination for potentially inculpatory purposes implicated a defendant's Fifth Amendment privilege against self-incrimination. Such an examination must, moreover, be accompanied or preceded by a knowing, intelligent, and voluntary waiver of the self-incrimination privilege. *Id.*, 469. To make such a waiver, the accused must have a full "awareness of the ... privilege *and the consequences of foregoing it*. *Id.* (Emphasis added). This, in turn, requires that before deciding whether or not to submit to the proposed examination, the accused be: (1) apprised of all the potentially incriminatory uses to which its results may be put, *id.*, 468; and (2) afforded a meaningful opportunity to consult with competent counsel concerning the technical and tactical ramifications of his decision. Id., 470-71. If an examination is conducted without such a constitutionally valid waiver, evidence obtained as a result of it must be suppressed. Miranda v. Arizona, 384 U.S. 436, 467-69 (1966).

When an accused presents a mental-status defense at trial, he is deemed to have waived his right not to be examined by the state's psychiatric experts. Buchanan v. Kentucky, 483 U.S. 402, 421-24 (1987). Like a defendant who testifies on his own behalf, his defense, though often presented through his own expert witnesses, is ultimately based on his own words, thoughts, recollections and mental processes as related to and analyzed by those witnesses. *See, Powell v. Texas,* ___ U.S. ____, 109 S.Ct. 3146, 3150 (1989). It is therefore appropriate to confront him within the scope of his testimony by exposing his mental processes to examination and analysis by the state's experts. Because effective preparation of rebuttal requires access to

the defendant close in time to the events at which his mental status will be contested, many states, including Connecticut, require that defendants give notice of their intention to rely on mental-status defenses within a reasonable time after they are formally charged. So advised that it may be called upon to rebut a mental-status defense at trial, the state, upon receipt of such notice, can move for an order that the defendant submit to a pretrial psychiatric examination whose results can only be used if the defendant later interposes that defense. When an accused who has been given adequate time to consult with counsel gives notice under such a rule, he can fairly be held to have placed his mental status in issue, and thereby waived his right not to be examined. If he fails to give notice within the time provided therefor, he may forfeit either his right to present the defense or to support it with expert testimony of his own.

This Court has approved the practice of ordering defendants to give pretrial notice of their intent to assert mental-status defenses at trial and of requiring that upon the giving of such notice they submit to such examinations or suffer sanctions, including the forfeiture of the defense or the right to rely on psychiatric experts. *Smith, supra*, 465. Even so, it has recognized that the decision whether or not to submit to compulsory psychiatric examinations is so fraught with peril for the defendant that he must be aided in making it by the "guiding hand of counsel." *Id.*, 471. This requirement is born of the Court's legitimate concern that the act deemed to constitute a waiver of the right not to submit to psychiatric examination be made with eyes open as to the full range of attending consequences, rather than by accident or inadvertence.[15] Anything less

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[15] Indeed, the possibility that the state will make important derivative use of the defendant's disclosures -- to develop new evidence, sharpen its understanding of previously gathered evidence, or otherwise enhance its ability to prepare and present its case on non-mental-status issues -- is greatly

could hardly be judged a voluntary, intelligent relinquishment of a known right or privilege, as *Smith* explicitly requires. *Id.*

In this case, by contrast, the defendant's putative waiver of his right not to be examined arose in a context where no reasonable person could conceivably have believed that he had waived anything. To begin with, the petitioner had not yet been charged with any crime, and thus could not reasonably be thought to have anticipated how he would defend himself against charges which had not yet been made. Secondly, his only use of psychiatric evidence concerned his current depression in the wake of the trauma he had just experienced, and related not at all to his mental status at the time of his wife's death. Thirdly, his counsel explicitly noted that he had not had enough time to consider possible mental-status defenses, or to advise the defendant thereon, and could not be required under Connecticut law to give notice of a defense on pain of forfeiting that defense until at least ten days after he was formally charged with murder or some other crime. In sum, as concurring Justice Healey pointed out, he had done nothing which could be construed as an affirmative act, performed with eyes wide open with the assistance of counsel, denoting an intent to place his mental status in issue. Absent such conduct it could not fairly be said that he had waived his Fifth Amendment privilege against self-incrimination.

This is not, of course, to say that a defendant can never be deemed to have waived his self-incrimination privilege without giving formal notice of his intent to present a mental status defense. Like the defendant in

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increased the further the compelled examination is moved back from the start of trial. Clearly, the state has a powerful incentive to make illicit derivative use of evidence in the earlier stages of its criminal investigation. Conversely, the defendant's ability to assess potential damage to his defense in view of his technical options and tactical alternatives is substantially limited as well.

Buchanan, supra, an accused can voluntarily submit to an examination, or he can announce his intention to present such a defense by other means. It is essential, however, that the decision whether or not to present such a defense, with its concomitant waiver of the right not to be examined, be the defendant's personal decision, made with a full awareness of its consequences, and in a time frame that affords him an adequate opportunity to consult with counsel. The petitioner's "choice" whether to resist the court-ordered examination and lose a possible defense he might later wish to assert or to submit to the examination and expose himself, perhaps unnecessarily, to interrogation about the potentially incriminating details of recent events, was really no choice at all. His participation in those examinations was coerced by the state's premature order. Their results should not have been available to the state to incriminate him by rebutting his mental-status defenses at trial.

II. **The decision below, permitting use of psychiatric testimony introduced solely to support or rebut mental-status defenses to prove the defendant's guilt, conflicts with decisions of this Court.**

In refusing to review and reverse the petitioner's conviction on grounds that his jury was erroneously instructed that it must consider all the mental-status evidence in this case on the issue of intent to kill, the Appellate Court arbitrarily ignored long-standing Connecticut case law and rules of practice governing the preservation and review of claimed constitutional errors in criminal jury instructions and sanctioned a clear violation of the petitioner's Fifth Amendment privilege against self-incrimination. The Connecticut Supreme Court's decision to let that ruling stand should be reviewed by this Court in order to maintain the delicate balance this Court has established between the state's need to examine a criminal defendant to rebut his mental-status defenses at trial and the defendant's Fifth

Amendment privilege against self-incrimination.

This Court has stated that a defendant who presents a mental-status defense at trial waives his Fifth Amendment privilege not to submit to a psychiatric examination conducted by the state's experts for the limited purpose of rebutting that defense. *Estelle v. Smith, supra*, 465. The presentation of defense evidence in support of a mental-status defense at trial operates as "a waiver of the Fifth Amendment privilege, just as the privilege would be waived if the defendant himself took the stand." *Powell v. Texas*, ___ U.S. ___, 109 S.Ct. 3146, 3149 (1989) (citing *Battie v. Estelle*, 655 F.2d 692, 701-02 and n.22 (5th Cir. 1981)).

Just as a testifying defendant does not waive his right not to be cross-examined beyond the scope of his direct testimony, a defendant who presents a mental-status defense at trial does not waive his right to resist the state's use of the results of a compulsory psychiatric examination for any purpose other than rebutting that defense. This limitation is fully consistent with the oft-stated purpose of court-ordered psychiatric examinations: to afford "the State ... the only effective means it has of controverting [the defendant's] *proof on an issue that he has interjected into the case*," *Estelle v. Smith, supra*, 465. (Emphasis added.) It also ensures any defendant who wishes to assert such a defense that he need not waive all his other rights and privileges by so doing. A psychiatric examination often elicits information which is useful not only to rebut a defendant's mental-status defenses, but to prove his guilt and/or enhance his punishment. If the defendant submits to a psychiatric examination with full knowledge that its results may later be used to prove his guilt, *and* later contests some element of the crime by presenting mental-status evidence of his own, the state may properly rebut his claim with the results of that examination. *Id. Accord, Buchanan v. Kentucky, supra*, 421-424. If, however, he does not contest any such element on the basis of mental-status evidence, then he, like a defendant who does not

testify, makes no waiver of his right not to have the results of a compulsory examination used for that purpose.[16]

Connecticut's rules of practice provide that nothing a defendant says in the course of a compelled psychiatric examination can be used against him on the issue of his guilt. C.P.B. §760.[17] C.P.B. §772 further provides that the only use the state can make of the results of any such examination is to rebut the defendant's claims at trial. Aware of these limitations, the petitioner limited his pretrial notice of intent to present mental-status evidence at trial to the affirmative defenses of insanity and extreme emotional disturbance. Though he could by law have attempted to contest the element of intent to kill with psychiatric evidence,[18] he did not do so, either in his notice, his argument to the jury, or his requests to charge. Instead, he explicitly asked that his jury be instructed to confine their consideration of his own expert's testimony to his two mental-status

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[16] Thus in *Powell v. Texas*, this Court declared that a defendant does not waive "his right not to have the results of a sanity examination used against him on the element of future dangerousness merely by raising the insanity defense at trial." Rather, it concluded, a defendant who pleads insanity is only on notice that by so doing he "open[s] the door to 'use of psychological evidence by the prosecution in rebuttal. . . ." *Id.*, 109 S.Ct. at 3150, n.3 (quoting *Buchanan, supra*, 425). "*Nothing in Smith*," the Court continued, "*or any other decision of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of trial.*" *Id.* (Emphasis added.)

[17] This rule, like that of many states, is based on Rule 12.2(c) of the Federal Rules of Criminal Procedure. It has been held to "effect[] a compromise between the defendant's right to avoid self-incrimination and the state's right to procure and present evidence of the defendant's mental state." *State v. Boscarino*, 204 Conn. 714, 736 (1987).

[18] Under C.G.S. §53a-54a(b), a defendant may offer psychiatric evidence to negate intent to kill. *State v. Burge*, 195 Conn. 232, 240 (1985). However, "by merely contesting the intent element of a charged crime, [he] does not ordinarily put his mental status in issue and may not be subjected to a court-ordered psychiatric examination." *State v. Fair*, 197 Conn. 106, 110 n.3 (1985).

defenses, thereby confirming the limited scope of his pretrial notice and ensuring that the state's experts' testimony could not be used for any other purpose under C.P.B. §772.

Even so, the trial court explicitly *required* the petitioner's jury to consider his own mental-status evidence and that of the state's experts *both* on his mental-status defenses *and* on the issue of intent to kill. This instruction violated the petitioner's legitimate expectations as to the limited uses to which his and the state's expert testimony would be put. It also violated his privilege against self-incrimination because it exceeded the scope of the knowing waiver which accompanied the introduction of his own expert's testimony.

The Appellate Court's failure to review this claim because the petitioner did not except to the trial court's instruction violated C.P.B. §852, which provides that "[t]he supreme court shall not be bound to consider error as to the giving of, or the failure to give, an instruction *unless* the matter is covered by a written request to charge *or* exception has been taken by the party appealing immediately after the charge is delivered." *Id.*[19] (Emphasis added.) Here, as previously noted, the petitioner raised this claim in two pertinent requests to charge. *See* App. 1E-5E.

Furthermore, it cannot be justified under the doctrine of *State v. Evans*, *supra*, which requires review of claimed constitutional errors when the "record adequately [demonstrates] that [the accused] has clearly been deprived of a fundamental constitutional right and a fair trial." *Id.*, 70. Under *Evans*, the Appellate Court undertook a limited review of the record to determine if the petitioner's claim was "truly of constitutional proportions or simply [so] characterized by [him]." It reached the latter conclusion based on the view that once a defendant places his mental status in issue for any purpose -- here, supporting his

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[19] This rule applies with equal force to appeals before the Connecticut Appellate Court. See C.P.B. §2000; App. 7D.

affirmative defenses -- it is properly in issue for all purposes, including intent to kill, to which it is always logically relevant. Under this analysis, anytime a defendant presents expert testimony as to his mental status for any purpose, however limited, both that testimony and any "rebuttal" testimony the state offers can be used for any purpose it sees fit. (App. 21B-23B).

This decision, which the Connecticut Supreme Court left undisturbed, seriously threatens fundamental Fifth Amendment values, for it allows the introduction of compelled testimony on the issue of guilt without a knowing waiver of the privilege against self-incrimination. If it is allowed to stand, future defendants everywhere will be deterred from asserting mental-status defenses for fear that the state will be entitled to use the results of compelled psychiatric examinations not only to rebut those specific defenses, but affirmatively to prove elements of the charged offense which have not been contested with mental-status evidence.

III. The decision below that a criminal defendant has no Sixth Amendment right to counsel at a court-ordered psychiatric examination conflicts with principles announced in this Court's prior decisions and presents an important, unresolved issue as to which the highest courts of several states are in conflict.

The Appellate Court's decision that the petitioner was not constitutionally entitled to the presence of counsel during the challenged psychiatric examinations was based on state and federal authorities which have misconstrued this Court's interpretations of the Sixth Amendment right to counsel in *United States v. Wade*, *supra*, and *United States v. Ash*, *supra*. Review is requested in order that this Court might decide this important, recurring question under settled Sixth Amendment principles, and thereby resolve the conflict

between those jurisdictions which have denied a right to counsel in the psychiatric examination context[20] and those which have recognized such a right under the authority of *Wade* and *Ash*.[21]

The essential function of counsel in any criminal prosecution is to ensure that his client receives a fair trial. *Powell v. Alabama*, 287 U.S. 45, 69-71 (1932); *Gideon v. Wainright*, 372 U.S. 335, 342 (1963).[22] The Sixth Amendment right to counsel has thus been held to extend to every "stage of the prosecution, in court or out, where the absence of counsel might derogate from the accused's right to a fair trial." *Wade, supra*, 226.

The *Wade* Court applied this functional test to a post-indictment lineup and concluded that the Sixth Amendment right to counsel extends to that proceeding because counsel's absence therefrom threatens the defendant's right to a fair trial. The *Wade* Court identified four factors which compelled that result: (1) the accused is invariably present

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[20] *See, e.g., United States v. Byers, supra*, and cases cited therein.

[21] Courts of six states have recognized a constitutional right to have counsel present at a psychiatric examination; *see Houston v. State*, 602 P.2d 784 (Alaska 1979); *State v. Mains*, 669 P.2d 1112 (Or. 1983); *State v. Nuss*, 763 P.2d 1249 (Wash. 1988); *Lee v. County Ct of Erie*, 267 NE.2d 452 (NY 1971); *State v. Lankford*, 781 P.2d 197 (Idaho 1989); and courts of two have found them presumptively appropriate but discretionary; *see State v. Whitlow*, 210 A.2d 763 (N.J. 1965; *People v. Martin*, 192 NW.2d 215 (Mich. 1971). *See also*, 3 A.L.R. 4th, 910.

[22] A fair trial, in turn, is one in which the defendant's fundamental constitutional rights are honored and he is given a full and fair opportunity to present his defense. *Faretta v. California*, 422 U.S. 806, 819 (1974). Counsel's role in preserving his client's right to a fair trial is a critical one. Law and tradition accord to him the responsibility to shape and present his client's factual defense, *Id.*, 820, to assert most of his constitutional rights, *Wainright v. Sykes*, 433 U.S. 72 (1977), and to counsel him as to those rights which he personally must waive or assert. *See, e.g., Brooks v. Tennessee*, 406 U.S. 605 (1972). This requires not only that counsel present the defendant's legal and factual claims *at* trial, but that he make sufficient preparations to do so effectively *before* trial. *Strickland v. Washington*, 486 U.S. 668 (1984).

in person at a lineup; (2) if not fairly conducted, a lineup carries with it "the potential for substantial prejudice to the accused[,]" *id.*, 232; (3) a viable challenge to the fairness of a lineup or the reliability of its results depends upon defense counsel's ability to accurately reconstruct it; and (4) counsel cannot accurately reconstruct a lineup unless he is actually present when it is conducted. Since counsel's presence at a lineup contributes materially to his ability to defend his client at trial, most particularly by enabling him to mount effective cross-examinations of the state's identification witnesses, the *Wade* Court held that a lineup is a "critical stage" of the prosecution at which the presence of counsel is constitutionally required.

In *Ash*, this Court was asked to rule that counsel's presence is also required at pretrial sessions in which the defendant's photograph is displayed to government witnesses who later testify at trial. Noting that under *Wade*, counsel's presence is not constitutionally required except at "trial-like confrontations" where his services are needed to assist the defendant "in coping with legal problems" or "in meeting his adversary," *Ash*, *supra*, 313, this Court declined to so rule for two reasons: first, a photo identification session, unlike a lineup, is not a "trial-like confrontation" because it does not involve a physical confrontation or interaction of any kind between the absent defendant and any other person; *id*; and second, the showing of inanimate photographs, unlike the exhibition of live suspects, is not a process so subtly suggestive and incapable of later reconstruction or duplication that a "trained observer" must view it personally in order to detect suggestive influences in it and to effectively cross-examine identification witnesses who have participated in it.

After *Ash*, many lower courts, including the D.C. Circuit in *Byers*, construed the *Ash* Court's restriction of the right to counsel to "trial-like confrontations" as a partial rejection or modification of *Wade*. Those courts read *Ash* to condition the defendant's right to counsel in any pretrial

proceeding on the defendant's immediate need, at the proceeding itself, for counsel's direct assistance "*either* ... to make a decision requiring distinctively legal advice .. *or* to defend himself against the direct onslaught of the prosecutor." *Byers*, *supra*, 1118 (emphasis in original). Applying that test, the *Byers* Court concluded that there was no Sixth Amendment right to counsel at a compelled psychiatric examination, since (1) "[a]t the psychiatric interview itself, [the defendant] ... ha[s] no decisions in the nature of legal strategy or tactics to make ... ," *id.*, (quoted in *Johnson*, *supra*, 590), and (2) "[a]n examining psychiatrist is not an adversary much less a professional one." *Byers*, *supra*, 1119, (quoted in *Johnson*, *supra*, 590).

Contrary to the *Byers* Court's reading of it, which the Appellate Court adopted in this case, *Ash* did not condition the right to counsel *either* on the presence of a prosecutor *or* on the active nature of counsel's anticipated role *during* the pretrial proceeding in question. Rather, the *Ash* Court made it clear that the true measure of the need for counsel in any proceeding is the contribution his presence will make to the fairness of his client's trial. Thus, in discussing and reaffirming its earlier holding in *Wade*, the *Ash* Court explained that:

> Although the accused was not confronted *there* with legal questions, the lineup offered opportunities for prosecuting authorities to take advantage of the accused. Counsel was seen by the Court as being more sensitive to, and aware of, suggestive influences than the accused himself, and as better able to reconstruct the events *at trial*. Counsel present at lineup would be able to remove disabilities of the accused in precisely the same fashion that counsel compensated for the disabilities of the layman at trial. Thus, the Court mentioned that the accused's memory might be dimmed by 'emotional tension', that the accused's credibility at trial would be diminished by his status as defendant, and that the accused might be unable to present his

> version effectively without giving up his privilege against compulsory self-incrimination. *It was in order to compensate for these deficiencies that the Court found the need for the assistance of counsel.*

Ash supra, 312-313 (emphasis added). In light of this explanation, it is apparent that the *Byers-Johnson* reading of *Ash* is unduly restrictive.[23] There is simply nothing in the *Ash* Court's approving description of *Wade* to suggest that the requirement of counsel at a lineup depends to any degree on counsel's ability *there and then* to advise his client on the law or to defend him against a professional adversary. *Byers* analysis is thus not a proper substitute for the true Sixth Amendment test announced in *Wade*: that the right to counsel extends to each "stage of the proceedings, in court or out, where the absence of counsel might derogate from the accused's right to a fair trial." *Wade*, *supra*, 226. *See also, Ash*, *supra*, 312-12).

Under *Wade*, a court-ordered psychiatric examination is manifestly a critical stage requiring the presence of counsel. First, not only is the accused present during the encounter as the object of the inquiry, but his role is especially active, unlike that of the defendant in *Wade*. His

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[23] Indeed, if literally applied to a lineup, the *Byers* Court's reading of *Ash* would have required the reversal of *Wade* rather than its reaffirmation. For as Professors LaFave and Israel have correctly observed:

> In post-indictment line-ups, it is not readily apparent what immediate assistance an attorney can provide. He cannot stop the line-up or see that it be conducted in a certain manner. He can give no legal advice, proffer no defenses, advance no arguments. The defendant is not in need of legal advice and the lawyer is not in a position to provide on the spot assistance against the skills of the prosecutor. In fact, his own recognized function is as a trained observer.

Lafave and Israel, *Criminal Procedure*, p. 330 (1985)(quoting Note, 64 J.Crim.L.C. & P.S. 428, 433 (1973)). At a corporeal lineup, moreover, the prosecutor is usually not present; rather, the defendant is typically confronted by police officers and lay witnesses who view him in silence, often through one-way mirrors. Thus a lineup is hardly a proceeding in which the defendant must face "the direct onslaught of the prosecutor." *Byers*, *supra*, 1118 (quoted in *Johnson*, *supra*, 590).

very words and demeanor[24] during the exam provide the data from which the psychiatrist evaluates his motivation and impairment and formulates a diagnosis.

Second, the exam is a confrontation at which the "potential for substantial prejudice to the accused" undeniably exists. The principal objective of the examination is to provide the state with the means to confront or rebut any mental-status defense offered by the defendant, *Estelle v. Smith*, *supra*, 465; and, just as in *Wade*, any claims by the accused of mistaken impression will be in vain, for the psychiatrist is purportedly relating and interpreting the defendant's own statements, and his testimony is likely to be accorded substantial weight. *U.S. v. Byers*, 740 F.2d 1104, 1154 (D.C. Cir. 1984)(Bazelon, J., dissenting). Moreover, the defendant's own account of the alleged crime is a major focus of the exam.[25] This, of course, triggers substantial constitutional concerns about abuse of the accused's privilege against self-incrimination.[26]

As to the third *Wade* factor, counsel must accurately

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[24] *See generally*, Rogers, *Conducting Insanity Evaluations*, 95, 115 (1986); Nicholi, *The Harvard Guide to Modern Psychiatry*, 30-39 (1978); MacDonald, *Psychiatry and the Criminal*, 61 (1969).

[25] *See* Rogers, *supra*. During the exam, the psychiatrist questions the defendant about his background and his actions and thought processes regarding the alleged crime. *Id.*, 115. This account is the *sine qua non* of an insanity evaluation. The psychiatrist's goal is to elicit a spontaneous, uninterrupted account, in as much detail as possible, of what occurred during the several days prior to the alleged criminal behavior, during the criminal behavior, and immediately following. *Id.*, 97. It is "followed by a second self-report in which highly specific questions are asked about thoughts, emotions, perception, and behavior" during the time in question. *Id.*

[26] In Oregon, for example, the defendant can choose not to answer questions asked by a psychiatrist and counsel is permitted to be present at all court-ordered psychiatric examinations because, "statements made by the defendant to the psychiatrist could provide a lead to other evidence which would incriminate the defendant on the issue of guilt." *Shepard v. Bowe*, 250 Or. 288, 290 (1968); *State v. Corbin*, 15 Or.App. 536 (1973).

and completely reconstruct the psychiatric interview before he can meaningfully attack any aspect of it on constitutional grounds. In order to assert a proper Fifth Amendment claim, counsel must know both the extent to which his client has answered questions beyond the legitimate scope of the examination, and the degree to which *any* information he has divulged creates the risk of derivative use on the issue of guilt. Where such a risk is perceived, counsel may, with knowledge of the exact words used during the examination, move for a protective order to preclude the psychiatrist from relating that information to the prosecutor and/or move to suppress any evidence potentially derived from the examination which the state seeks to introduce at trial on the issue of guilt. Possessed of such evidence, counsel also gains a better basis upon which to counsel his client whether to waive any mental-status defense altogether rather than allow the state to gain access to and use of the defendant's statements to the psychiatrist.

Accurate reconstruction is also a prerequisite to an effective challenge to the reliability of the psychiatrist's diagnosis, either on cross-examination or through expert witnesses. The diagnostic process is uniquely tied to the psychiatrist's perception and interpretation of the defendant's words; the reliability of this process depends upon the psychiatrist's ability to accurately hear, understand, process, and interpret those words. *See* Rogers, *supra*, 61, 77. This process is also uniquely tied to the particular psychiatrist's presuppositions and personal and institutional biases[27] which are at least as capable of engendering an erroneous conclusion as the "suggestiveness" identified in *Wade*, *supra*, 228. Such influences affect both the evaluation of the data which

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[27] The Supreme Court recognized this factor in *Estelle v. Smith*, *supra*. "The decision to be made regarding the proposed psychiatric evaluation is . . . 'difficult . . . even for an attorney' because it requires 'a knowledge . . . of the particular psychiatrist's biases and predilections." *Id.*, 471 (quoting *Smith v. Estelle*, 602 F.2d 699 (5th Cir. 1979)).

the psychiatrist observes and his conscious or unconscious decisions regarding what to notice in the interview and what to remember from it.[28] Ziskin, *Coping With Psychiatric and Psychological Testimony*, 159 (3rd ed. 1981).[29]

The psychiatrist's biases and predilections may also cause him to unintentionally determine the behavior and responses of the defendant. Since the interviewer asks certain questions rather than others, and follows up on certain responses and not others, his behavior may have a profound effect on the responses offered by the interviewee. *See* E. Coles, *supra*, 68; R. Rosenthal, *supra*, 38-86. *See also Byers*, *supra*, 1169 (Bazelon, J., dissenting). Unless counsel can accurately reconstruct the interview, he will be unable to identify the subtle distortions and interactions that may have affected the psychiatrist's reports and testimony or expose such defects through defense experts. Similarly, he will have no concrete basis for cross-examining the psychiatrist as to the specific criteria he used or the overall

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[28] *See*, E. Coles, *Clinical Psychopathology*, 68-69 (1982) ("The importance of [the] persuasive influence of training and experience cannot be overestimated . . . psychiatrists who encounter cues that don't fit with their diagnostic conclusions are prone to misinterpret, misperceive, and even ignore them."); R. Rosenthal, *Experimenter Effects in Behavioral Research*, 7 (1966) ("Events occurring in the clinical interaction are often unobserved or at least unreported by the clinician. . . . And often, the errors may be shown to be related to the personal characteristics of the clinical observer, particularly to his personal 'blind spots.'").

[29] The importance of this becomes clear when one considers that the psychiatrist's testimony in the courtroom is based solely on these data which he has selectively noted and remembered. *Id.*, 160. What the psychiatrist omits may cast serious doubt on the validity of his conclusions. *See*, Pasamanick, Dinitz, and Lefton, *Psychiatric Orientation and Its Relation to Diagnosis and Treatment in a Mental Hospital*, 131 (1959). ("Clinicians . . . may be selectively perceiving and emphasizing only those characteristics and attributes of their patients which are relevant to their own preconceived system of thought. As a consequence, they may be overlooking other patient characteristics which would be considered crucial by colleagues who are otherwise committed.")

theoretical structure he employed in reaching his diagnosis.[30]

As to the fourth and final criterion of *Wade*, it is clear neither the client nor the psychiatrist is an adequate substitute for counsel's presence at the examination. The psychiatrist cannot be counted on to provide the necessary reconstruction, not only because he may lack sufficient neutrality to respond fairly to challenges to his professional work, but because he was so deeply involved in the encounter himself. *See* E. Coles, *supra*, 52. Likewise, the defendant cannot be counted on to provide the necessary reconstruction because the technical complexity and subtle factors involved in the interview interfere with his ability to relate the encounter in any useful detail. He, moreover, like the defendant in *Wade*, is immersed in a tension-filled confrontation. *Wade*, *supra*, 230. Counsel, as a non-participant, can thus play a unique and important role in the reconstruction process.

For all of these reasons -- to preserve and protect his client's Fifth Amendment privilege, to counsel him effectively on whether or not to persist in his assertion of a mental-status defense, and to detect subtle biases in the expert's methodology so that he might expose them more effectively on cross-examination -- the presence of counsel at a compelled psychiatric interview necessary is to preserve his client's right to a fair trial. The time has arrived for this Court to "examine the encounter," as the *Ash* opinion requires, to assay the true importance of counsel's role therein. Absent clear guidance from this Court, future defendants in many states and circuits will be deterred, if not prevented, from asserting their right to counsel at a time when they may need it the most: when they are examined by government experts whose later testimony

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[30] Two jurisdictions which recognize the "criticality" of a pre-trial psychiatric examination, require the presence of counsel in the role of an observer "to make more effective [the defendant's] right of cross-examination." *Lee v. County Court of Erie County, supra*; *Houston v. State, supra*.

concerning their words and conduct during those examinations may seal their fates forever.

CONCLUSION

For all the foregoing reasons, the petitioner respectfully urges this Court to grant certiorari and review each of the questions herein presented.

Respectfully submitted,

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May 30, 1990

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

RUSSELL F. MANFREDI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* RUSSELL F. MANFREDI (13706)

PETERS, C. J., HEALEY, CALLAHAN, GLASS and COVELLO, Js.

Convicted of the crime of manslaughter in connection with the death of his wife, the defendant appealed to the Appellate Court claiming, inter alia, that the trial court erred in requiring him to submit to a series of psychiatric examinations before he filed notice of his intent to rely on the defenses of insanity and extreme emotional disturbance. The Appellate Court affirmed the trial court's decision holding that although

the trial court erred in ordering the compulsory examinations, the defendant had not been prejudiced by the error. On the granting of certification, the defendant appealed to this court. *Held:*

1. The trial court did not exceed its authority when it ordered the defendant to submit to a series of psychiatric examinations pursuant to the rule of practice (§ 760) permitting a court to order such an examination "in an appropriate case"; at the time the court ordered the examinations, the defendant had already presented expert testimony indicating that he had been experiencing serious emotional and mental difficulties, and the court was advancing the objectives of assuring the state an opportunity to procure reliable and timely expert testimony and of economizing medical and legal resources as well as minimizing the number of examinations the defendant might be forced to undergo.

(One justice dissenting)

2. The defendant could not prevail on his claim that the admission of expert testimony derived from the challenged psychiatric examinations violated his constitutional privilege against self-incrimination; the defendant had himself placed his mental status in issue before the examinations were ordered by introducing psychiatric evidence in support of motions to modify his bond conditions, and he conceded that the state made no improper derivative use of the information acquired in the challenged examinations.

Prerequisites to a trial court's order that a defendant who has not yet asserted a mental status defense undergo a psychiatric examination, stated.

Argued November 1, 1989—decision released January 30, 1990

Information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the jury before *Corrigan, J.*; verdict and judgment of guilty of manslaughter in the first degree, from which the defendant appealed to the Appellate Court, *Dupont, C. J., Spallone* and *Foti, Js.*, which affirmed the trial court's decision and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Michael R. Sheldon, with whom was *Todd D. Fernow*, for the appellant (defendant).

Harry Weller, assistant state's attorney, with whom were *John M. Bailey*, state's attorney, and, on the brief,

Herbert Appleton, assistant state's attorney, and *Paul Edwards*, student intern, for the appellee (state).

PETERS, C. J. The dispositive issue in this appeal is the validity of the trial court's orders requiring the defendant to submit to a series of psychiatric examinations before the defendant filed notice of his intent to rely on the defenses of insanity and extreme emotional disturbance. A jury of twelve found the defendant, Russell F. Manfredi, guilty of manslaughter in the first degree, in violation of General Statutes § 53a-55 (a) (2),[1] and the court, *Corrigan, J.*, sentenced him to a term of imprisonment of twenty years. The defendant appealed this judgment to the Appellate Court. *State* v. *Manfredi*, 17 Conn. App. 602, 555 A.2d 436 (1989). The Appellate Court held that the trial court had erred by ordering the compulsory psychiatric examinations before the defendant had asserted his mental status defenses, but upheld the defendant's conviction after concluding that the defendant had not been prejudiced by the error. We granted the defendant's petition for certification to appeal from the Appellate Court; *State* v. *Manfredi*, 211 Conn. 809, 559 A.2d 1142 (1989);[2] and conclude that the trial court did not err in ordering the defendant to undergo the psychiatric examinations.

[1] General Statutes § 53a-55 provides in pertinent part: "(a) A person is guilty of manslaughter in the first degree when . . . (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance . . . ."

[2] We granted certification to appeal the following question: "Did the Appellate Court err in sustaining the admission of expert psychiatric testimony elicited by the state in advance of the filing of notice of intent to rely on a defense of mental disease or defect?" Pursuant to Practice Book § 4140, the state also filed the following question as an alternative ground for affirming the judgment of the Appellate Court: "Whether this was an appropriate case under Practice Book § 760 for the trial court to order a psychiatric examination prior to the defendant's assertion of mental disease or defect under Practice Book § 759?"

The relevant facts are not in dispute. The victim, Catherine Manfredi, was found dead in her car in West Hartford on March 8, 1985. Although the car had been involved in an accident, the nature of the victim's injuries and her position in the car led the police to conduct further inquiry into the cause of her death. Following an autopsy of the victim, a day long investigation of the car and the home that the defendant and the victim had shared, and an interrogation of the defendant, the defendant was arrested on a warrant charging him with the murder of his wife.

The defendant was arraigned on March 11, 1985. The court, *Doyle, J.*, set bond at $150,000 and barred the defendant from any contact with his children pending further review of the situation. On March 13, 1985, the defendant moved for a modification of his bond. In support of this motion, the defendant presented the testimony of Walter A. Borden, M.D., who had briefly visited the defendant two days before the hearing. Borden testified that the defendant was "in a state of confusion, emotional confusion, depression, grief, [and] shock," and recommended that "he should be in a psychiatric hospital for a relatively short period of time." Following a hearing, the court, *Purtill, J.*, revised the defendant's bond to include a condition that he enter a hospital for psychiatric treatment and remain at that institution as long as required by his treating physician. The defendant was released on bond and entered John Dempsey Hospital on March 16, 1985.

On March 26, 1985, the state submitted a motion requesting a psychiatric examination of the defendant pursuant to Practice Book § 760[3] and also requesting

[3] "[Practice Book] Sec. 760. — —PSYCHIATRIC EXAMINATION

"In an appropriate case the judicial authority may, upon motion of the prosecuting authority, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the defendant in the course of any examination pro-

an extension of the court's prior order prohibiting the defendant from seeing or communicating with his children. At the same time, the defendant moved the court to permit communication with his children, and submitted letters from Borden and from Bruce Greyson, M.D., in support of this request. After hearing argument on these motions, the court, *E. Y. O'Connell, J.*, ordered the defendant to submit to a psychiatric examination by Peter Zeman, M.D. In its ruling on the motion, the court noted that the examination was appropriate because the defendant had already introduced psychiatric evidence into the case, and because an additional expert opinion might assist the court in deciding upon the motions concerning the defendant's contact with his children and in evaluating the other conditions of his bond. The court also determined, based upon the evidence before it at that time, that the order prohibiting the defendant from having contact with his children should be extended.

The defendant thereupon moved for a protective order in connection with Zeman's psychiatric examination. Specifically, the defendant requested that: (1) no examinations be conducted without the presence of counsel; (2) the examinations be limited to matters concerning his competency to stand trial; (3) no question be asked of him relating to the events surrounding the death of his wife; and (4) any matters of substance elicited from him not be communicated to anyone other than himself or his counsel. The court, *E. Y. O'Connell, J.*, denied the motion, noting that, although the defendant had not yet filed notice of intent to rely on a defense of mental disease or defect, he had already introduced

vided for by Sec. 757, whether the examination shall be with or without the consent of the defendant, shall be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding. A copy of the report of the psychiatric examination shall be furnished to the defendant within a reasonable time after the examination."

the "psychiatric aspect of the case" by presenting the testimony of Borden and the letters from Borden and Greyson. The court therefore concluded that "fairness, equity and justice required that the state be able to also have an examination in order that it could make certain representations and know where it was going with the case."

In accordance with the trial court's order, Zeman began a series of psychiatric examinations of the defendant in April, 1985. When the defendant refused to complete the examination process, the court, *E. Y. O'Connell, J.*, granted the state's motion to compel and, also in response to a request from the state, ordered the defendant to submit to psychological testing. In response, the defendant requested that the court order Zeman not to communicate to the state any information, with the exception of his diagnosis, that he might obtain during his examinations of the defendant. The state indicated that it was not opposed to a protective order that prohibited the state from obtaining substantive evidence concerning the crime.[4] Although the court expressed its reluctance to act on an oral motion since it might later be unclear as to the exact details of an oral ruling, it noted that there was merit to the defendant's request, and invited the defendant to "file such a motion as you deem appropriate and attach a suggestive order to it." Although the defendant filed a written motion the same day, the record does not reflect the trial court's disposition of the motion.

The examination process resumed, with Anne Marie Phillips, a clinical psychologist, conducting the psychological testing of the defendant and Zeman examining him on several additional occasions. In total, Zeman

[4] The state's sole objection to the proposed protective order was that the state should have access to more information than the diagnosis to the extent that the information concerned such collateral matters as would be relevant to the defendant's release conditions and contact with his children.

examined the defendant eight times and Phillips examined him twice (collectively, the prenotice examinations). It was not until nearly one year after the prenotice examinations had been conducted that the defendant filed notice, pursuant to Practice Book §§ 758 and 759,[5] of his intention to raise the defenses of insanity and extreme emotional disturbance. Following the filing of this notice, the court, *Barall, J.*, ordered that Zeman conduct an additional psychiatric examination of the defendant. Zeman thereafter examined the defendant on two occasions (the postnotice examinations).

At trial, the defendant took the stand and admitted that he had in fact killed his wife.[6] The defense there-

[5] "[Practice Book] Sec. 758. — —NOTICE BY DEFENDANT

"If a defendant intends to rely upon the defense of mental disease or defect at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions pursuant to Sec. 811 or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this section, mental disease or defect may not be raised as a defense. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate."

"[Practice Book] Sec. 759. — —MENTAL DISEASE OR DEFECT INCONSISTENT WITH THE MENTAL ELEMENT REQUIRED FOR THE OFFENSE CHARGED

"If a defendant intends to introduce expert testimony relating to a mental disease or defect, or another condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. He shall also furnish the prosecuting authority with copies of reports of physical or mental examinations of the defendant made in connection with the offense charged, within five days after receipt thereof. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate."

[6] The defendant testified that, on the evening of March 7, 1985, he fatally struck his wife with a baseball bat after a night long series of arguments that had escalated to the point of the victim slapping and punching him

fore focused almost exclusively on his claims of insanity and extreme emotional disturbance. In support of those claims, the defendant presented several lay character witnesses to testify that he was not prone to anger, violence, or loss of temper. The defendant also offered extensive testimony from Borden, who had observed the defendant shortly after the crime and had subsequently interviewed him approximately twenty-five times. After describing in great detail the defendant's actions as he understood them, Borden testified that, in his opinion, the defendant had been suffering from a catathymic crisis on March 8, 1985, when he killed his wife.[7] That crisis was arguably triggered by his wife's hitting him with the baseball bat, an episode which revived the defendant's feelings of humiliation, degradation and rage over being hit with a yardstick as a child, with the result that the victim came to represent someone from the past. Borden thus concluded that the defendant had been totally out of control when he struck his wife, having acted directly contrary to his conscious thinking and values.

The state presented both Phillips and Zeman to rebut the defendant's defenses of insanity and extreme emotional disturbance. Phillips testified that it was her opinion, based upon a series of psychological examinations that she had administered, that the defendant was probably not suffering from a severe psychological dysfunction, thought disorder, impulse disorder, psychotic

as well as hitting him with the bat. The defendant further testified that he had not intended to hurt or kill his wife. He admitted, however, that he had attempted to conceal his responsibility for her death by throwing the victim's body out the window, placing her body in the car, and leaving her at the scene of the car accident and then fabricating the story that the victim had been vomiting blood and had attempted to drive herself to the hospital.

[7] Borden explained that a catathymic crisis centers on a relationship in which there has been significant difficulty and feelings of sexual inadequacy, and is tied to past emotional problems.

process, hallucinations or delusions on March 7 and March 8, 1985. Zeman testified that the defendant was "in a state of extreme agitation" at the time of his wife's death, and that he was suffering from an adjustment disorder with mixed emotional features, but concluded that he was not suffering from a psychotic disorder. Zeman further testified that it was his opinion that the defendant did not undergo a catathymic crisis. Neither Phillips nor Zeman offered any testimony concerning the facts relating to the defendant's involvement with his wife's death.[8]

Following his conviction, the defendant appealed to the Appellate Court, arguing, inter alia, that the trial court had erred in compelling him to submit to the prenotice psychiatric examinations.[9] The Appellate Court concluded that § 760 did not authorize a compulsory examination at the time that the trial court issued its orders because the defendant had not placed his mental status in issue until he asserted the defenses of insanity and extreme emotional disturbance. The court went on to conclude, however, that the error was harmless in light of the facts of this case. The court relied in particular on the trial court's finding that the postnotice examinations had not been tainted by the prenotice examinations. In addition, the court noted that there was no evidence that the prenotice and post-

[8] Indeed, Phillips was apparently unable to obtain any information from the defendant concerning his actions on March 7 and 8, as she testified that the defendant had refused to discuss that subject with her.

[9] The defendant also claimed that the trial court erred in: (1) instructing the jury that it could consider psychiatric testimony presented by the defense and by the prosecution in determining whether the state had proved the requisite intent to commit murder; and (2) refusing to permit defense counsel to be present at the prenotice examinations or to allow the defendant to record these examinations. The Appellate Court refused to review the first claim after determining that the defendant had not objected to the charge, and found no error on the second claim based on its conclusion that the right to counsel does not extend to compulsory psychiatric examinations. These conclusions are not at issue in the present appeal.

notice examinations had elicited different information, or that the state had used the prenotice examinations to acquire substantive information concerning the alleged crime. Id., 620. The defendant renews his challenges to the prenotice examinations in this appeal, arguing that the orders violated both § 760 and his privilege against self-incrimination and that the admission of testimony derived from the prenotice examinations requires reversal of his conviction.

I

We turn first to the question of whether the trial court exceeded its authority under § 760 when it ordered the defendant to submit to a series of psychiatric examinations over one year before the defendant declared his intent to rely on the defenses of insanity and extreme emotional disturbance. The defendant argues that, read together, Practice Book §§ 756 through 761 require that a trial court find one of the following three conditions before it can order a psychiatric examination over the defendant's objection: (1) the defendant has filed notice of intent to rely on the defense of mental disease or defect, in accordance with § 758; (2) the defendant has filed notice of intent to present expert testimony concerning a mental disease or defect inconsistent with the mental element required for the offense charged, in accordance with § 759; or (3) the defendant has in some other manner placed in issue his mental status at the time of the offense. Based upon this interpretation of the Practice Book, the defendant contends that the trial court's prenotice examination orders were invalid since none of the required conditions was present. We disagree.

Section 760 imposes no further condition on the ability of a trial court to order a compulsory psychiatric examination than a determination that the situation before the court presents "an appropriate case" for

such an examination, and we have previously held that this determination is committed to the discretion of the trial court. *State* v. *Lovelace*, 191 Conn. 545, 549, 469 A.2d 391 (1983), cert. denied, 465 U.S. 1107, 104 S. Ct. 1613, 80 L. Ed. 2d 142 (1984); see also E. Margolis, "In Defense of the Insanity Defense," 58 Conn. B.J. 389, 405 (1984). While our prior cases have upheld trial court actions compelling examinations under § 760 when a defendant has filed notice pursuant to §§ 758 or 759; see *State* v. *Lovelace*, supra; or when defense counsel has asserted a mental status defense at trial; *State* v. *Fair*, 197 Conn. 106, 111-12, 496 A.2d 461 (1985), cert. denied, 475 U.S. 1096, 106 S. Ct. 1494, 89 L. Ed. 2d 895 (1986); the defendant has cited no authority for the proposition that these are the only circumstances under which a court may order an examination. We conclude that the trial court exercised its discretion appropriately in this case.

At the time that the trial court ordered the prenotice examinations, the defendant had already presented expert testimony indicating that he had been experiencing serious emotional and mental difficulties. In addition, the trial court was aware that the defendant had been hospitalized, pursuant to his doctor's recommendations, for treatment of these problems. While the defendant had presented this evidence in connection with his motions to modify his bond conditions, and not in an effort to establish insanity or extreme emotional disturbance, it was reasonable for the court to conclude that these problems might be relevant to the question of whether the defendant was suffering from a mental disease or defect at the time of the offense. By permitting the state a psychiatric examination of the defendant at this time, the trial court was simply advancing the objective of § 760 to assure the state an opportunity to procure reliable and timely expert testimony that would enable it to meet a defendant's men-

tal status defense. L. Orland, 4 Connecticut Practice: Superior Court Criminal Rules (1986) p. 214; E. Margolis, supra, 404. Had the state been forced to await the defendant's assertion of his mental status defenses, notice of which was not forthcoming until the defendant had already undergone nearly one year of psychiatric treatment, the state's examination would have had little or no persuasive weight on the issue of the defendant's mental condition at the time of the offense.

We also find support for the trial court's order in several federal cases holding that a trial court has the power to order an examination of the defendant's mental condition at the time of the offense along with an examination concerning the defendant's competency to stand trial. See, e.g., *United States* v. *Wright*, 627 F.2d 1300, 1312 (D.C. Cir. 1980); *United States* v. *Reifsteck*, 535 F.2d 1030, 1033 (8th Cir. 1976); *United States* v. *Wade*, 489 F.2d 258, 258–59 (9th Cir. 1973); *United States* v. *Moudy*, 462 F.2d 694, 697 (5th Cir. 1972). While noting that "the discretion to enlarge the examination does . . . expose [the accused] to the possibility of bolstering the government's case," these courts have reasoned that consolidating the examinations is appropriate because it "allows economy of judicial and medical efforts, of prosecution and defense efforts, and of the accused's time" and because, "in the end, all concerned—court, counsel, and parties—have an interest in determining if the accused was incompetent at the time of the offense, if that is to be an issue, and we see no prejudice in the court's ordering that such determination be made sooner rather than later . . . . ." *United States* v. *Moudy*, supra, 697. In the present case, the trial court's orders compelling the defendant to undergo psychiatric examination to determine his mental condition at the time of the offense along with the examinations inquiring into the propriety of the defendant's bond conditions served a simi-

lar function in economizing judicial and medical resources as well as minimizing the number of examinations that the defendant might be forced to undergo.

Central to our conclusion that a court may order a psychiatric examination under § 760 before a defendant has asserted a mental status defense is the availability of a protective order sealing the contents of any psychiatric reports, with the exception of the diagnosis, until the defendant has actually filed notice of his defenses. Such an order, authorized by Practice Book § 785, would eliminate any risk that the state might inappropriately acquire substantive information concerning the defendant's involvement with the alleged offense.[10] Although the record in this case does not indicate the trial court's disposition of a proposed protective order that the defendant had submitted at the court's suggestion, we need not inquire into whether the state made illicit derivative use of this information since the defendant has expressly conceded that it did not.

II

The defendant also challenges the prenotice psychiatric examinations on the ground that the trial court's order compelling him to submit to these examinations violated his privilege against self-incrimination as guaranteed by the fifth amendment to the United States constitution.[11] According to the defendant, he did not place his mental status in issue, and thus could

[10] Practice Book § 760 also prohibits the state from using information obtained in a compulsory examination to meet its affirmative burden of proving the defendant's guilt of the offense. *State* v. *Fair*, 197 Conn. 106, 110-11, 496 A.2d 461 (1985), cert. denied, 475 U.S. 1096, 106 S.Ct. 1494, 89 L. Ed. 2d 895 (1986); *State* v. *Boscarino*, 204 Conn. 714, 734-37, 529 A.2d 1260 (1987).

[11] The fifth amendment to the constitution of the United States provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

not be compelled to submit to a compulsory psychiatric examination, until he filed notice of his intent to rely on the defenses of insanity and extreme emotional disturbance. He maintains, therefore, that any expert testimony derived from compulsory examinations conducted before he filed notice of his mental status defenses must be excluded as the fruit of a constitutionally invalid waiver of his privilege against self-incrimination. Since all of the testing administered by Phillips and the majority of the examinations conducted by Zeman preceded the defendant's notice of his mental status defenses, he contends that it follows that the trial court's admission of this testimony was reversible error. We are not persuaded.

Our analysis begins with the well established proposition that the fifth amendment privilege against self-incrimination ordinarily protects a criminal defendant from compulsory psychiatric examinations. *Estelle* v. *Smith*, 451 U.S. 454, 468, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981); *State* v. *Fair*, supra, 109; *State* v. *Lovelace*, supra, 550. It is equally clear, however, that "[a] criminal defendant waives this privilege . . . when he places his mental status in issue." *State* v. *Fair*, supra. Once a defendant has waived the privilege, the state may require him to submit to a psychiatric examination, and the results of such an examination may be introduced at trial for the purpose of rebutting the defendant's mental status defenses. *State* v. *Fair*, supra, 110–12; *State* v. *Lovelace*, supra, 551–52; see also *Estelle* v. *Smith*, supra, 465. A defendant effectively places his mental status in issue for fifth amendment purposes by filing notice of intent to rely on a defense of insanity or extreme emotional disturbance; *State* v. *Lovelace*, supra, 550–51; or by presenting testimony in support of these defenses at trial. *State* v. *Fair*, supra, 111–12; see *Buchanan* v. *Kentucky*, 483

U.S. 402, 423, 107 S. Ct 2906, 97 L. Ed. 2d 336, reh. denied, 483 U.S. 1044, 108 S. Ct. 19, 97 L. Ed. 2d 807 (1987).

In light of these precedents, the question presented in this case, one that neither this court nor the Supreme Court of the United States has previously addressed, is whether a defendant may ever be said to have placed his mental status in issue, thereby waiving his privilege against self-incrimination, even though he has not yet formally filed notice of his intent to rely on a mental status defense. Our review of the record persuades us, contrary to the conclusion of the Appellate Court, that this defendant had placed his mental status in issue before the trial court ordered him to undergo psychiatric examination.[12] As the trial court expressly noted, the defendant had introduced "the psychiatric aspect of the case" before the state requested an examination. Furthermore, as we have already discussed, the defendant had presented psychiatric evidence to the trial court on two separate occasions indicating that he was suffering from emotional and mental difficulties so serious that he required hospitalization. While the defendant's objective in submitting this evidence was to support his motions to modify his bond conditions, and not to establish insanity or extreme emotional disturbance, the presentation of the evidence nevertheless served to apprise the court that there was some question as to whether the defendant's mental condition was consistent with his culpability for the alleged crime.

The defendant nevertheless maintains that he had not waived his privilege against self-incrimination because he had not formally placed his mental status

[12] At oral argument, the state asserted that this case presents no fifth amendment problem whatsoever in light of dictum in the recent decision of the Supreme Court of the United States in *Powell* v. *Texas*, U.S. , 109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989). According to the state, *Powell*

in issue by filing notice of his intent to rely on a mental status defense. This argument ignores the principle that our fifth amendment jurisprudence "strikes a balance between the legitimate needs of the state and the cognizable rights of the defendant." *State* v. *Fair*, supra, 110. While the defendant must be free from compulsion to disclose incriminatory information concerning the offense for which he has been charged, courts have frequently reiterated that the state must be afforded some opportunity to acquire information that will enable it to "respond intelligently to defenses that concern a defendant's mental status." Id.; *United States* v. *Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984); *United States* v. *Reifsteck*, supra, 1034; *Alexander* v. *United States*, 380 F.2d 33, 39 (8th Cir. 1967). In this case, the defendant had presented to the trial court substantial evidence regarding his psychological problems. On the basis of that evidence, the court had reasonable grounds to find that the defendant's mental status might be an issue in the case, and to conclude that a psychiatric examination would be essential to the state's ability to respond intelligently to a mental status defense.[13] See *United States* v. *Jines*, 536 F.2d 1255, 1256 (8th Cir.), cert. denied, 429 U.S. 942, 97 S. Ct. 361, 50 L. Ed. 2d 312 (1976). A requirement that the state wait what was in this case nearly one year until the defendant files

v. *Texas* establishes that a subsequent assertion of a mental status defense serves to validate even previous psychiatric examinations that were conducted in violation of a defendant's privilege against self-incrimination. Id., 3149. Since we conclude that the defendant had placed his mental status in issue by the time the trial court ordered the prenotice psychiatric examinations, we need not address this argument in this case.

[13] We note that in analogous circumstances, when it is the defendant who needs access to the psychiatric history of a witness, we have held that the patient-psychiatrist privilege must yield when the defendant has demonstrated that there is " 'any *reasonable basis* in the evidence for believing that psychiatric personnel may have information relating to the mental condition of a witness that might affect his testimony . . . .' " (Emphasis added.) *State* v. *Hufford*, 205 Conn. 386, 403–404, 533 A.2d 866 (1987); *State* v. *Pierson*, 201 Conn. 211, 227, 514 A.2d 724 (1986).

a formal notice of a mental status defense, while the defendant in the meantime undergoes psychiatric treatment, would serve only to ensure that any evidence the state did eventually acquire regarding the defendant's mental condition at the time of the offense would be less than fully reliable.

Moreover, the case law indicates that a court may, under certain circumstances, impose a mental status defense on an unwilling defendant. In *State* v. *Asherman*, 193 Conn. 695, 731-32, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985), for example, we held that a trial court can charge the jury on extreme emotional disturbance even if the defendant does not wish to present that defense. Similarly, courts have held that a trial court has a responsibility to introduce the insanity defense, even if the defendant has refused to do so, if the evidence raises a significant question concerning the defendant's sanity. *United States* v. *Wright*, supra, 1307, 1310-11; *Whalem* v. *United States*, 346 F.2d 812, 818-19 (D.C. Cir.), cert. denied, 382 U.S. 862, 86 S. Ct. 124, 15 L. Ed. 2d 100, reh. denied, 382 U.S. 912, 86 S. Ct. 245, 15 L. Ed. 2d 164 (1965). A necessary concomitant of the judicial duty to consider mental status defenses sua sponte is the power to seek expert assistance in evaluating the defendant's psychological problems. *United States* v. *Wright*, supra, 1312; *United States* v. *Jines*, supra, 1256. The court's independent authority to order an inquiry into mental status is analogous to its power to order an examination concerning mental competency at the time of trial whether or not the defendant has raised the issue. See *Estelle* v. *Smith*, supra, 465.

Finally, we emphasize that a compulsory prenotice psychiatric examination is available only under very limited circumstances, and an order compelling submission to such an examination must be carefully structured to ensure compliance with the provisions of § 760

and to protect the defendant's privilege against self-incrimination. Accordingly, we now hold, as a general matter, that in the absence of timely objections, a trial court must satisfy the following three prerequisites before ordering a criminal defendant to undergo psychiatric examination prior to the time he has asserted a mental status defense. First, the court must find that the defendant has presented substantial evidence regarding his mental condition that furnishes reasonable grounds for concluding that his mental status at the time of the crime may be an issue in the case. Second, the court must indicate, on the record, the basis for its finding that the defendant has placed his mental status in issue. Third, the court must impose an appropriate protective order regarding communication between the state and the examining physician.

Applying this standard to this case, the evidence to which we have already alluded clearly satisfies the first prerequisite, and the trial court detailed these findings on the record, in accordance with the second prerequisite. With respect to the court's obligation to craft an appropriate protective order, it is unclear from the record whether the defendant waived this protection at the time of the prenotice examinations.[14] We need not further explore this deficiency in the record, however, in light of the defendant's concession that the state did not make any improper derivative use of the information acquired in the prenotice examinations.

The judgment of the Appellate Court is affirmed.

In this opinion CALLAHAN, GLASS and COVELLO, Js., concurred.

[14] As we previously indicated, the trial court invited the defendant to submit a proposed protective order, and the state did not object to such an order as long as the state would be permitted access to information relevant to the defendant's bond conditions. Although the defendant did file a motion and suggested order, the record does not indicate the trial court's disposition of the motion.

ARTHUR H. HEALEY, J., dissenting in part and concurring in part. I respectfully disagree with Part I of the majority opinion. I, however, join in affirming the judgment of the Appellate Court.

I

Prior to discussing the majority's analysis in Part I, it is important to set out some additional circumstances, none of which are in dispute. On March 26, 1985, after the state filed its motion asking for a psychiatric examination of the defendant, pursuant to Practice Book § 760, and sought a continuation of the prior court order prohibiting him from seeing or communicating with his children, the defendant moved for permission to see his children. The trial court granted the state's motion for a psychiatric examination and in early April, 1985, Peter Zeman, a psychiatrist, began a lengthy series of psychiatric examinations of the defendant that, when concluded in July, 1986, included ten separate sessions totaling about seventeen hours. Eight of these examinations were conducted in April and May of 1985, with at least four of them occurring even before the start of the defendant's hearing in probable cause. Certain psychological testing also ordered by the court was performed by Anne Marie Phillips, a clinical psychologist, on April 29, 1985, and May 7, 1985.[1]

It is important to note that all of these events occurred before the probable cause hearing even started on May 17, 1985.[2] That date was fifty-three days after the examinations were ordered and at least forty-five days after the first examination was con-

[1] There does not appear, especially from anything the trial court said, that the examinations ordered concerned the competency of the defendant to stand trial. See General Statutes § 54-56d.

[2] There appears to be no question that from the outset defense counsel properly objected and excepted to all of the rulings involving the court-ordered examinations and endeavored completely to protect the defendant's rights throughout the pretrial and trial proceedings in this regard.

ducted. On June 18, 1985, the state filed an information charging the defendant with murder, to which he pleaded not guilty and elected a jury trial. On May 9, 1986, the defendant filed his notice of intent to raise the defenses of mental disease or defect and extreme emotional disturbance to be supported by expert testimony. Thereafter, pursuant to an order of the court, the defendant was again examined by Zeman on two occasions, June 10, 1986, and June 24, 1986. Trial began on September 23, 1986, and, on December 18, 1986, the jury returned a verdict of guilty of manslaughter in the first degree in violation of General Statutes § 53a-55.

Although the majority does not expressly say so, the only fair reading of that opinion upholding the trial court is that the "situation before the court" presented "an appropriate case" for ordering such an examination. The ineluctable consequence of this determination under the circumstances is that the defendant had in some manner placed in issue his mental status at the time of the offense. This, of course, is entirely based on circumstances that took place long before the defendant had been accorded the constitutionally guaranteed right under the Connecticut constitution of a probable cause hearing to decide whether he should "be held to answer for [the] crime [of murder]." Specifically, our constitution provides: "No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law . . . . " Conn. Const., amend. XVII. It is difficult to understand how this defendant can be said to have indicated that he "intend[ed] to introduce expert testimony relating to a mental disease or defect, *or another condition* bearing upon the issue of whether he had the mental state required for the offense charged . . . " (emphasis added); Practice Book § 759;

long before he was legally charged with murder "in accordance with the procedures prescribed by law."[3] Conn. Const., art. I, § 8. Prior to the constitutional determination that probable cause existed after the hearing required by General Statutes § 54-46a, there was no crime to which he could even properly be required to plead; he was not even constitutionally or statutorily accused of murder until that probable cause hearing had made it possible for the state to take that step. This was no formalistic step; it was constitutionally mandated. In *State* v. *Lovelace,* 191 Conn. 545, 549, 469 A.2d 391 (1983), cert. denied, 465 U.S. 1107, 104 S. Ct 1613, 80 L. Ed. 2d 142 (1984), we said that "Practice Book §§ 757 through 761, inclusive, relate to defenses based on the defendant's mental state." At the very least, this defendant could not appropriately be said to have set up or notified the state of this "defense" or any defense until he had been constitutionally accused of murder and entered his plea to the information, as he did on June 18, 1985.[4]

Putting aside for the moment the state's ability to have a meaningful evaluation of his mental state, unless ordered at the time it was in this case, was it "appropriate" for the trial court to conclude, as it did long before the probable cause hearing, that "fairness,

[3] The fact that prior to the constitutional probable cause hearing that started on May 17, 1985, the defendant was being held on an arrest warrant charging murder demonstrates no more than that a disinterested magistrate had found probable cause to believe that he had committed that crime.

[4] Actually, there is no claim that the defendant should have filed his notice of intent under Practice Book §§ 757 through 761 at that time or anywhere near that time. He did not actually file that notice until almost one year later, i.e., on May 6, 1986. I do not dispute that over that period he was receiving psychiatric treatment nor can it be overlooked that the state had had those series of psychiatric and/or psychological sessions with the defendant, which are chronicled above, since March, 1985, and the final two sessions in 1986 after the notice of intent was filed by the defendant. I do not understand that the defendant "made" the state wait until May 6, 1986, before he filed this notice.

equity and justice require that the State be able to also have *an* examination in order that it could make certain representations and know where it was going with the case?" (Emphasis added.) I think not. It so concluded because it said that the defendant had already "introduced the psychiatric aspect of the case" by presenting the testimony of psychiatrist Walter A. Borden and the letters from Borden and psychiatrist Bruce Greyson. The majority acknowledges that "[w]hile the defendant had presented this evidence in connection with his motions to modify his bond conditions, and not in effort to establish insanity or extreme emotional disturbance . . . " yet "it was reasonable for the court to conclude that these problems might be relevant to the question of whether the defendant was suffering from a mental disease or defect at the time of the offense." The majority continues and points out that permitting "*a* psychiatric examination" at that time "simply advanc[ed] the objective of § 760 to assure the state an opportunity to procure reliable and timely expert testimony that will enable it to meet a defendant's mental status defense."

Against this background, I do not agree with the majority that this presents "an appropriate case" under § 760 for the trial court to enter the orders which it did.[5] First, it is fair to say that the state knew where it was going with the case; it first had to go to a probable cause hearing. Parenthetically, the statute governing such a hearing provides in part: "No motion to suppress or for discovery shall be allowed in connection with such hearing." General Statutes § 54-46a (b). Query whether ordering the mental examination here at the time it was could ever be said to allow "discov-

[5] I can, however, envisage a scenario under a demandingly different fact pattern which might present "an appropriate case" under Practice Book § 760 to have a mental status examination of a defendant even before the constitutional probable cause hearing.

ery" under § 54-46a. Second, it is incongruous to me how the trial court can reasonably bottom its subsequent orders on the opinion that the defendant has already "introduced the psychiatric aspect of the case" to mean, as it must, that the defendant has put his mental status at the time of the offense in issue. In my view, this was an abuse of discretion and, hence, clearly erroneous. Whether the trial court felt that the "problems" indicated by the evidence adduced concerning bond conditions "might be relevant to the question whether the defendant was suffering from a mental disease or defect at the time of the offense" was itself not only irrelevant at that time but, more to the point, it was in derogation of the defendant's rights as already set out and to which now may be added his fifth amendment privilege against self-incrimination from compulsory psychiatric examinations. I cannot deny that he had presented psychiatric evidence, but how can it reasonably be said that he had placed in issue, in this case, his mental status at the time of the offense? It simply cannot. To utilize the previous psychiatric evidence in another circumstance to say that the defendant has already "introduced the psychiatric aspect of the case" and to go on to say that he has put his mental status at the time of the offense in issue under § 760 is a quantum leap of the superlative degree.

I have absolutely no problem with the state having a psychiatric examination of a defendant early on; it should not have to wait to do so for an unreasonable time. Fairness, equity and justice require it in certain cases; fairness, equity and justice did not, however, require it in this case. Singly or collectively, none of these concepts can even justify, let alone require, the order for the examinations by the trial court. To do as the trial court did, in effect, impermissibly imposed upon the defendant the obligation of undergoing an examination targeting a defense to a crime for which

he had not even yet been properly held to answer under the Connecticut constitution. In addition, however, this imposition went further beyond the date probable cause was found because there was a time beyond that date that the defendant was still not required, or for all we know, even pressed on whether he intended to file a notice of intent. Judicial economy, to which the majority refers, is not an insular consideration that repels other considerations, especially a defendant's constitutional rights. In this instance, it appears to me that it was determined that the defendant's constitutional rights did not outweigh judicial economy.

Justice Felix Frankfurter once said in dissent: "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States* v. *Rabinowitz*, 339 U.S. 56, 69, 70 S. Ct. 430, 94 L. Ed. 653 (1950). If we assume, arguendo, that the philosophy of this observation is surely applicable here, as I believe it is, this was not "an appropriate case" for the examination order entered. Fewer constitutional principles have a higher call upon the discretion of a judge than the protection of the privilege against self-incrimination as well as the right to present a defense *after* proper accusation of a crime, especially homicide.

Because I cannot agree that that discretion was correctly exercised here, I respectfully dissent from Part I of the majority opinion.

On the other hand, I cannot agree with the defendant that since all of the testing administered by Phillips and the majority of the examinations conducted by Zeman preceded his filing the notice of his mental status defenses under § 760 was reversible error. In doing so, I agree with the conclusion of the majority on that issue for reasons other than those given.

While it is my view that, inter alia, the trial court's ordering of the examinations in the first instance was error, error which included a violation of the defendant's fifth amendment privilege against self-incrimination, that error was rendered harmless by later events. I agree, as does the majority, that the Appellate Court correctly decided that the initial error in ordering the examination did not, as the trial court found, taint the postnotice examinations by Zeman. Moreover, the Appellate Court noted that there was no evidence that the prenotice and postnotice examinations had elicited different information or that the state has used the prenotice examinations to acquire substantive information concerning the alleged crime.

Under the circumstances of this case, once the defendant filed his notice of intent under § 760 *and* agreed, thereafter, upon query by Zeman, that he then had nothing to change vis-a-vis his prenotice statements prior to additional examination by that psychiatrist *and* he offered evidence at trial, both personally and through experts, concerning his mental status at the time of the offense, in my view, cured any valid pre-existing bar to Zeman's rebuttal testimony.

In coming to this view, I note that even though "[t]he self-incrimination privilege serves a variety of interests beyond the protection of the innocent, yet the [United States Supreme] Court in *Chapman* [v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, reh. denied, 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967)] held the harmless error standard applicable to an infringement of that right." 3 W. LaFave & J. Israel, Criminal Procedure, § 26.6, p. 274. In any event, a defendant who makes an involuntary statement is not perpetually disabled from giving a subsequent voluntary statement. *Oregon* v. *Elstad*, 470 U.S. 298, 311, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985); *United States* v. *Bayer*, 331 U.S. 532, 540–41, 67 S. Ct. 1394, 91 L.

Ed. 1654 (1947). There was temporally a significant time period between the last prenotice examination and the filing of the notice of intent under § 760 by the defendant that is important. This accords with the rationale of our statement that where the original statement was induced by a violation of the defendant's rights, a subsequent confession can be voluntary where there is a "sufficient ' "break in the stream of events" ' as to justify the admission of [the] subsequent confession." *State* v. *Shifflett*, 199 Conn. 718, 741, 508 A.2d 748 (1986).

I, therefore, concur in affirming the judgment of the Appellate Court.

STATE OF CONNECTICUT *v.* RUSSELL F. MANFREDI (5693)

DUPONT, C. J., SPALLONE and FOTI, Js.

The defendant, who was charged with the crime of murder, was convicted of the crime of manslaughter in the first degree in connection with the death of his wife. On his appeal to this court, the defendant claimed, inter alia, that the trial court erred in compelling him to submit to a series of pretrial psychiatric examinations before he filed notice of intent to rely on defenses of insanity and extreme emotional disturbance. *Held:*

1. The defendant was not, under the circumstances here, denied his right to a fair trial as a result of the trial court's order compelling him to submit to pretrial psychiatric examinations; although the defendant had not, at the time the trial court ordered those examinations, placed his

mental status in issue, he did file a written notice of his intent to rely on the defenses of insanity and extreme emotional disturbance prior to undergoing two of the court ordered examinations, and the trial court's determination that the information elicited during those examinations was essentially the same as that elicited prior to his giving notice was not clearly erroneous.

2. The defendant's claim, raised for the first time on appeal, that the trial court erred in instructing the jury that it could consider psychiatric testimony presented by the defense and by the prosecution in determining whether the state had proved the requisite intent to commit murder, was not of constitutional proportion to merit review under *State* v. *Evans* (165 Conn. 61).

3. The defendant's claim that the trial court denied him the right to assistance of counsel by denying his motion to have counsel present at the court ordered psychiatric examination was unavailing since the right to counsel does not extend to such examinations, nor does the right to counsel require that a court ordered psychiatric examination be recorded.

Argued November 7, 1988—decision released March 7, 1989

Information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the jury before *Corrigan, J.*; verdict and judgment of guilty of manslaughter in the first degree, from which the defendant appealed to this court. *No error.*

Charles D. Ray and *Ramona Stilley Carlow*, certified legal interns, with whom were *Michael R. Sheldon* and, on the brief, *Todd D. Fernow*, *Timothy H. Everett* and *John T. Carey*, certified legal intern, for the appellant (defendant).

Harry Weller, deputy assistant state's attorney, with whom were *Herbert Appleton*, assistant state's attorney, and, on the brief, *John M. Bailey*, state's attorney, and *Pamela Weidman*, law student intern, for the appellee (state).

DUPONT, C. J. The defendant appeals from the judgment of conviction, following a jury trial, of manslaughter in the first degree, in violation of General Statutes

§ 53a-55 (a) (2).[1] The defendant claims that the trial court erred (1) in compelling him to submit to a series of pretrial psychiatric examinations, (2) in instructing the jury that they could use defense and prosecution expert testimony to find that he possessed the requisite intent to commit murder, (3) in denying his request to have his counsel present at the court ordered psychiatric examinations, and (4) in denying his request to have the court ordered psychiatric examinations recorded. We find no reversible error.

The facts are virtually undisputed. Shortly after 6 a.m. on March 8, 1985, a 1979 Oldsmobile registered to the defendant's wife was found to have crashed into a utility pole in West Hartford. Officers of the West Hartford police department found the body of the defendant's wife's on the front floor of the car, with her arms twisted unnaturally and several gashes on the right rear of her head. The police department undertook a day long investigation, studying the car and the West Hartford home of the defendant and his wife, where both had resided with their three young sons. As part of that investigation, photographs were taken of the car and portions of the defendant's home, including the garage and master bedroom. The defendant was questioned by the police, an autopsy was performed, and later that evening the home was searched pursuant to a warrant. Several hours later, the defendant was arrested on a warrant charging him with the murder

[1] General Statutes § 53a-55 provides in pertinent part: "(a) A person is guilty of manslaughter in the first degree when: . . . (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection . . . ."

of his wife. After a trial the jury returned a verdict of guilty of manslaughter in the first degree pursuant to General Statutes § 53a-55 (a) (2). The defendant was sentenced to twenty years imprisonment. Other facts relevant to the issues in this appeal will be discussed below.

I

The defendant first claims that the trial court erred in compelling him to submit to a series of pretrial psychiatric examinations conducted pursuant to Practice Book § 760,[2] in violation of his federal constitutional privilege against self-incrimination, as guaranteed by the fifth amendment to the United States constitution and made applicable to the states through the due process clause of the fourteenth amendment; *Malloy* v. *Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 359 (1981); and his privilege against self-incrimination contained in article first, § 8, of the constitution of Connecticut. The following facts are relevant to this claim. On March 11, 1985, the defendant was arraigned before the court, *Doyle, J.* The defendant was advised of his *Miranda* rights,[3] bond was set at $150,000, and the defendant was ordered, over his objection, not to see or communicate with his children until further court review. On March 13, 1985, a further hearing on bond was held before the court, *Purtill, J.* In support of his plan for the posting of bond, which called in part for the defendant's temporary hospitalization upon his

[2] Practice Book § 760 provides in pertinent part: "In an appropriate case the judicial authority may, upon motion of the prosecuting authority, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the defendant in the course of any examination provided for by Sec. 757, whether the examination shall be with or without the consent of the defendant, shall be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding."

[3] *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

release, the defendant presented the testimony of psychiatrist Walter Borden. Borden, who had briefly visited the defendant two days before, testified that the defendant was "in a state of confusion, emotional confusion, depression, grief, [and] shock." On that basis, he concluded that even though the defendant did not present a danger to himself or others and was not likely to flee the jurisdiction if released, "he should be in a psychiatric hospital for a relatively short period of time." When questioned by the court, Borden confirmed that the defendant was in need of temporary hospitalization "given his state of mind right now." Accepting Borden's conclusion that "at the present time [the defendant] has . . . problems [for which] he should be in some type of institution, where he can be treated," the court ordered that, as a condition of his bond, the defendant was to enter a hospital and remain there for as long as his treating physician required. The next day, the bond arrangements were finalized. The order regarding the defendant's hospitalization was continued and clarified to include a requirement that the defendant could not leave the hospital without notifying the court.

On March 26, 1985, the state moved the court, *E. Y. O'Connell, J.*, for a psychiatric examination of the defendant under Practice Book § 760 and for an order under Practice Book § 667[4] seeking a continuance of the court's prior order prohibiting the defendant from seeing or communicating with his children. The defendant simultaneously moved for permission to see his children. The hearing also involved the bond condition requiring the defendant to report to the court before

[4] Practice Book § 667 provides in pertinent part: "Upon a showing that there exists a danger that the defendant . . . will seek to intimidate witnesses . . . the judicial authority, upon the defendant's release, may enter an order that he do one or more of the following: . . .

"(2) Comply with specified restrictions on his . . . association . . . ."

his release from the hospital. At the hearing on these motions, the state argued that this was "an appropriate case" under Practice Book § 760 for a psychiatric examination because the defendant might later rely upon the defenses of extreme emotional disturbance or insanity. See Practice Book §§ 758 and 759.[5] Citing the defendant's hospitalization as evidence of this possibility, the state claimed that an examination should be conducted "as soon as possible" to "protect the state's interest." Having just been given the state's motion, defense counsel stated that he was not prepared to address it. Expressing concern as to the parameters and purpose of any examination, the defendant argued that Practice Book § 760 was not applicable to the case as no decision had yet been made concerning possible defenses.

[5] Practice Book § 758 provides: "[DISCLOSURE BY THE DEFENDANT—DEFENSE OF MENTAL DISEASE OR DEFECT]— —NOTICE BY DEFENDANT

"If a defendant intends to rely upon the defense of mental disease or defect at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions pursuant to Sec. 811 or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this section, mental disease or defect may not be raised as a defense. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate."

Practice Book § 759 provides: "[DISCLOSURE BY THE DEFENDANT—DEFENSE OF MENTAL DISEASE OR DEFECT]— —MENTAL DISEASE OF DEFECT INCONSISTENT WITH THE MENTAL ELEMENT REQUIRED FOR THE OFFENSE CHARGED

"If a defendant intends to introduce expert testimony relating to a mental disease or defect, or another condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. He shall also furnish the prosecuting authority with copies of reports of physical or mental examinations of the defendant made in connection with the offense charged, within five days after receipt thereof. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate."

The court stated that it would like to have "the benefit of the psychiatric examination in passing on" the defendant's motion to see his children, and the state's motion under Practice Book § 667. In support of his motion to see his children, the defendant had submitted letters from Borden[6] and psychiatrist Bruce Greyson. The state opposed the defendant's motion, relying on Practice Book § 667, on a tape recording of an interview with the children, and on the fact that the defendant was currently being "treated by two psychiatrists." Observing that the defendant's hospitalization and the reports submitted by the defendant "may impinge" upon its determination of the motions before the court, the court granted the state's motion for a psychiatric examination of the defendant over his objection. The only specification in the court's order was that the examination be conducted by psychiatrist Peter Zeman, if he was available. The court, after viewing the taped interview with the defendant's children, granted the state's § 667 motion and denied the defendant's motion for permission to see his children on the ground that contact with the children "could cause confusion or otherwise be a disturbing influence to the children, which would interfere with the orderly administration of justice."

On March 27, 1985, the defendant moved for a protective order concerning the upcoming court ordered examination. Alleging that his constitutional rights would otherwise be violated, the defendant requested (1) that no examinations be conducted without the presence of counsel, (2) that the examinations be limited to matters concerning his competency to stand trial, (3) that no question be asked of him relating to the events surrounding the death of his wife, and (4) that

[6] Borden's letter was also submitted to demonstrate the defendant's compliance with the court's prior order requiring the defendant to report to the court before he was released from the hospital.

any matters of substance elicited from him not be communicated to anyone other than himself or his counsel. The court, *E. Y. O'Connell, J.*, heard argument on the motion on March 29, 1985. At that hearing, the defendant argued that any psychiatric examination pursuant to § 760 was inappropriate because no notice of an intent to rely on a defense of mental disease or defect had been filed under Practice Book § 758. Alternatively, the defendant requested the presence of counsel at the examination or that it be recorded.

The state argued that Borden's earlier testimony, the defendant's hospitalization, and the strength of the state's case indicated that the only foreseeable defenses would be insanity or extreme emotional disturbance and, therefore, this was "an appropriate case" under Practice Book § 760. The state further argued that the defendant's fifth and sixth amendment rights would not be violated if counsel was not present, and that there would be "nothing lost," as the information could not be used if the defendant did not file the defense. The state complained that, if the prior order were rescinded, it "could be forced to be waiting for I don't know how long before the defendant may wish to put the state and the court on notice that he's going to rely on either one or both of those defenses." The court was also told that Zeman would not examine the defendant if defense counsel, a court reporter, or a tape recorder were present.

The court denied the defendant's motion, reasoning that the defendant, and not the state, had introduced the "psychiatric aspect" of the case by presenting the testimony of Borden and the letters from Borden and Greyson such that "fairness, equity and justice required that the state be able to also have an examination in order that it could make certain representations and know where it was going with the case." Relying on federal cases, the court also denied the defendant's

request to have counsel present at the court ordered psychiatric examination and his alternate request for a recording of the examination.[7]

Zeman examined the defendant ten times for a total of seventeen hours. Eight examinations were conducted in April and May, 1985. On April 19, 1985, the state moved for the defendant to comply with the court's March 29, 1985 order requiring him to undergo a psychiatric exam, stating that the examination had begun but had not been completed, and that the defendant refused to comply with the court's order. At a hearing on April 22, 1985, the state informed the court, *E. Y. O'Connell, J.*, that Zeman desired psychological testing done on the defendant in order to have a complete examination with which to meet the defendant's defense of mental disease or defect, "if and when it arises." This motion was granted over the defendant's objection.

Given the court's ruling and the fact that no notice of a defense of mental disease or defect had been filed, the defendant asked the court to order Zeman not to communicate to the state any information obtained during the examinations other than Zeman's diagnosis. The state opposed the defendant's request, claiming that there was a collateral matter then before this court, concerning the defendant's children about which the state and Zeman had, and would continue to have, discussions. The state further argued that it should also be allowed to have discussions with Zeman concerning the release condition of the bond that had been imposed prohibiting the defendant from seeing or communicating with his children.

Reluctant to rule without a written motion, the court denied the defendant's oral motion and noted his excep-

[7] See parts III and IV of this opinion for a discussion of the defendant's claims with respect to this aspect of the court's ruling.

tion. The court invited the defendant "to file such a motion as you deem appropriate and attach a suggestive order to it." The court stated that, if the state objected to the order, further arguments would be heard. That same day, the defendant filed a motion requesting (1) that Zeman be prohibited from revealing the substance of any conversation with the defendant to the state's attorney, agents thereof, the state police or municipal police of any community, and (2) that any communication between Zeman and the state's attorney's office be limited to Zeman's diagnosis of the defendant's current emotional condition. The record does not indicate the court's disposition of that motion.

The psychological testing ordered by the court to complete Zeman's examinations was conducted on April 29 and May 7, 1985, by psychiatrist Anne Marie Phillips. The defendant's probable cause hearing commenced on May 17, 1985, forty-nine days after the examinations were ordered. On June 18, 1985, the state filed the information charging the defendant with murder, to which the defendant pleaded not guilty and elected a jury trial. On August 9 and September 18, 1985, the defendant filed identical motions to suppress (1) all of the testimony of Zeman concerning statements made by him about the events immediately before and after March 8, 1985, and (2) any evidence that the state intended to use that was indirectly or directly derived from conversations between Zeman and anyone in the state's attorney's office. On May 6, 1986, the defendant filed notice of his intent to raise the defense of mental disease or defect and extreme emotional disturbance pursuant to Practice Book §§ 758 and 759. Thereafter, he was examined twice more by Zeman on June 10 and 24, 1986, pursuant to an order by the court, *Barall, J.*

On appeal, the defendant claims that the trial court erred in compelling him to submit to a pretrial psy-

chiatric examination under Practice Book § 760 before he filed written notice of his intent to rely on the defenses of insanity and extreme emotional disturbance pursuant to §§ 758 and 759, thereby violating his privilege against self-incrimination under the federal and state constitutions.

"The privilege against self-incrimination embodied in the fifth amendment and made applicable to the states by the fourteenth amendment to the constitution of the United States . . . protects an accused against compulsory submission to psychiatric examination. *Estelle* v. *Smith*, 451 U.S. 454, 468, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). A similar result obtains under article first, § 8, of the constitution of Connecticut." *State* v. *Lovelace*, 191 Conn. 545, 550, 469 A.2d 391 (1983), cert. denied, 465 U.S. 1107, 104 S. Ct. 1613, 80 L. Ed. 2d 142 (1984). This privilege is waived, however, "when [the defendant] places his mental status in issue." *State* v. *Fair*, 197 Conn. 106, 109, 496 A.2d 461 (1985), cert. denied, 475 U.S. 1096, 106 S. Ct. 1494, 89 L. Ed. 2d 895 (1986). Accordingly, the constitutionality of a compulsory psychiatric examination under Practice Book § 760 "depends upon whether the defendant has placed his mental status in issue." Id.

"Any defendant who asserts the defense of extreme emotional disturbance . . . raises the issue of his mental status and hence relinquishes his privilege against submitting to court-ordered psychiatric examination." Id., 111. "[W]hen a defendant raises the defense of insanity, he may constitutionally be subjected to compulsory examination by court-appointed or government psychiatrists . . . and when he introduces into evidence psychiatric testimony to support his insanity defense, testimony of those examining psychiatrists may be received (on that issue) as well." *United States* v. *Byers*, 740 F.2d 1104, 1115 (D.C. Cir. 1984).

The question presented in this case is whether the defendant had placed his mental status in issue by raising the defenses of insanity or extreme emotional disturbance at the time the trial court compelled him, pursuant to its order of March 26, 1985, to submit, over his objection, to a psychiatric examination before he filed written notice of his intent to rely on the defenses of insanity and extreme emotional disturbance pursuant to Practice Book §§ 758 and 759.[8] Our careful review of the record indicates that the defendant had not.

[8] Similar claims were raised in *State* v. *Harman*, 198 Conn. 124, 135–36, 502 A.2d 381 (1985); *State* v. *Lovelace*, 191 Conn. 545, 549–55, 469 A.2d 391 (1983), cert. denied, 465 U.S. 1107, 104 S. Ct. 1613, 80 L. Ed. 2d 142 (1984); *State* v. *Smith*, 185 Conn. 63, 79–85, 441 A.2d 84 (1981); but were not addressed. In *State* v. *Smith*, supra, the defendant gave written notice that he might rely on the defense of mental disease or defect and present expert testimony concerning his mental state. He was subsequently compelled to undergo a court ordered examination under Practice Book § 760 over his objection. On appeal, the defendant claimed that the state violated his right against self-incrimination by *using* the information gleaned from the psychiatric reports to change the information originally filed against him. Although the Supreme Court acknowledged that the "case raises difficult questions concerning whether the state has actually compelled the defendant to disclose testimonial communications"; Id., 83; they declined to address those questions as they found that the information did not incriminate the defendant, that the disclosed information may have been helpful to the defendant, and that the change in the information had a sufficient independent basis.

In *State* v. *Lovelace*, supra, although the defendant had not yet filed notice that he intended to introduce evidence of his mental state; Practice Book §§ 758, 759; he did not object to the court's initial order compelling him to submit to a psychiatric examination. On appeal, the defendant alleged that the order of the court compelling him to submit to a *second* examination during trial violated his privilege against self-incrimination and his right to due process. The court held that once the defendant raised the issue of his mental state, the question of whether it was "an appropriate case" for an additional examination under Practice Book § 760, and the extent of such examination, was to be determined by the exercise of judicial discretion and the requirements of due process.

In *State* v. *Harman*, supra, the court stated that it did not need to consider the constitutionality of the court ordered examination because the defendant stipulated to the admissibility of the psychiatrist's testimony. The court concluded that, by expressly consenting to the use of the state's

On appeal, the state argues that Borden's testimony at the defendant's bond hearing, the written testimony of Borden and Greyson presented at the hearing on the defendant's motion to modify a condition of his bond, the defendant's stay in a hospital for psychiatric purposes, and the strength of the state's case against the defendant all indicated that the only foreseeable defenses the defendant had available to him were those concerning his mental status at the time the crime was committed.[9] The state therefore argues that the defendant had placed his mental status in issue at the time he was compelled to submit to a series of psychiatric examinations conducted pursuant to the court's order of March 26, 1985. By contrast, the defendant argues that he had not placed his mental status in issue until he filed his written notice of intent to present the defenses of mental disease or defect and extreme emotional disturbance pursuant to Practice Book §§ 758 and 759 on May 6, 1986.

Borden's testimony at the defendant's bond review hearing on March 13, 1985, was introduced by the defendant to assist the trial court in setting the conditions for the defendant's release pending trial. Borden's testimony concerned whether the defendant, if he was released on bail, was likely to flee the jurisdiction or would present a danger to himself or others. Borden also testified that, in his opinion, the defendant should be admitted, on a voluntary basis, to some type of men-

psychiatric testimony, "the defendant waived any constitutional claims he may have had with respect to this testimony." Id., 136.

[9] The state also argues that the court file reflects that the defendant was being "evaluated regarding the charges against him" before he had filed his notice under Practice Book §§ 758 and 759. The state points to an August 5, 1985 letter from Borden as evidence that the defendant was being so evaluated. We find this argument unpersuasive because the letter was written after the defendant was ordered by the court to submit to a psychiatric examination on March 26, 1985, and after the examinations were conducted pursuant to that order.

tal hospital. This testimony does not indicate that the defendant had asserted the defenses of insanity or extreme emotional disturbance, thereby placing his mental status in issue at the time he was compelled by the court to submit to a series of psychiatric examinations conducted pursuant to the court's order of March 26, 1985.

The letters from Borden and Greyson, introduced by the defendant on March 26, 1985, were presented to support the defendant's motion to modify the condition of his bond prohibiting him from communicating with or seeing his children. The substance of these letters pertained to that motion. Borden's letter discussed his, and the defendant's, concern for the children and recommended that they be referred to an experienced child psychiatrist and have the benefit of their own counsel to represent their interests. Greyson's letter concerned his professional opinion that the resolution of the defendant's clinical condition would be enhanced if he had the opportunity to meet with his children. Neither of these letters enables us to conclude that the defendant had asserted the defenses of insanity or extreme emotional disturbance, thereby placing his mental status in issue at the time he was compelled to submit to a series of psychiatric examinations conducted pursuant to the court's order of March 26, 1985.

The presentation of psychiatric testimony by a defendant for purposes of setting a condition of his bond, or deciding whether he should be allowed to see or communicate with his children, does not equal a statement by the defendant that he intends to rely on a defense of mental disease or defect, nor does it allow an inference that he will rely on such a defense.

Finally, the state's argument that the defendant was hospitalized for psychiatric purposes, and that the strength of the state's case against the defendant made

it obvious that the only foreseeable defenses available to the defendant were insanity and extreme emotional disturbance, are not determinative of the issue. The psychiatric hospitalization could have related to the defendant's competency to stand trial[10] or his general well-being. Furthermore, as the examination was ordered eighteen days after the crime and more than a year before the defendant filed written notice of his intent to rely on a defense of mental disease or defect pursuant to Practice Book §§ 758 and 759, defenses other than those cited by the state could have been foreseeable.[11] Accordingly, we cannot conclude that the defendant had placed his mental status in issue by asserting the defenses of insanity or extreme emotional disturbance at the time he underwent a series of psychiatric examinations conducted pursuant to the court's order of March 26, 1985, thereby waiving his constitutional privilege against compulsory submission to a psychiatric examination. The constitutional requirement that a defendant must first place his mental status in issue by asserting the defenses of insanity or extreme emotional disturbance before he may be compelled to submit to a psychiatric examination is not a requirement that can rest on prosecutorial speculation.

We conclude that the defendant had not placed his mental status in issue at the time he was compelled to submit to a series of psychiatric examinations by Zeman conducted pursuant to the court's order of March 26, 1985, and, therefore, that this was not an "appropriate case" under Practice Book § 760.[12] It is undisputed

[10] See generally General Statutes § 54-56d.

[11] See generally General Statutes § 53a-16.

[12] This conclusion is not intended to mean that "an appropriate case" under Practice Book § 760 is limited to those cases where the defendant has placed his mental status in issue by asserting the defenses of insanity or extreme emotional disturbance pursuant to the written provisions of Practice Book §§ 758 and 759. See *State* v. *Fair*, Records & Briefs, p. 6, June Term, 1985 (defense counsel in questioning prospective jurors on voir dire

by the parties, however, that the defendant did place his mental status in issue when he filed written notice with the court on May 6, 1986, that he intended to rely on the defenses of insanity and extreme emotional disturbance pursuant to Practice Book §§ 758 and 759; see *United States* v. *Byers*, supra, 1115; *State* v. *Fair*, supra, 111; and when he presented evidence on his mental status at trial. See *United States* v. *Byers*, supra, 1110; *State* v. *Lovelace*, supra, 551. Accordingly, the defendant waived his constitutional privilege against compulsory submission to psychiatric examination and " 'expose[d] his mental processes to reasonable examination by the state.' " *State* v. *Fair*, supra, 109, quoting *State* v. *Lovelace*, supra, 551-52.

Zeman examined the defendant both before, and after the defendant had placed his mental status in issue by filing his notice under Practice Book §§ 758 and 759. When ruling on the admissibility of Zeman's testimony at trial, the court, *Corrigan, J.*, found that the defendant's case had become "proper . . . so that sometime the court was authorized to compel such an exam", that the two postnotice examinations were not objectionable, and, after an in camera hearing was held with Zeman,[13] that the postnotice examinations did not elicit any information different from the prenotice examinations.

articulated his intention to defend the case by a claim of extreme emotional disturbance).

[13] At the in camera hearing, Zeman testified in pertinent part: "Examination by Mr. Daly [defendant's attorney]

"Q: Doctor, what are the last two dates that you saw Dr. Manfredi?

"A: The last two dates that I saw Dr. Manfredi were June 10 and June 24, 1986.

"Q: And previous to that time you had seen him, what, eight times?

"A: That's correct.

"Q: And when was the last of those eight times that you saw him?

"A: The last of the eight times was May 21, 1985.

"Q: Okay. Now, do you have with you any notes that you took while you interviewed Dr. Manfredi?

The defendant argues that, by their "very nature," the prenotice examinations potentially could have provided the state with a windfall of "case-related" information, subject to illicit and derivative use by the state. The defendant fails, however, to point to any specific information or evidence used at trial that he claims the state acquired from the prenotice examinations. Although the defendant claims that the state's attor-

"A: Yes, I do.

"Q: May I see those that are applicable to 1986 dates. Perhaps you could find those for me.

"A: All right. These two.

"Q: Thank you. Are there somewhere in those notes references to any conversations you had with Dr. Manfredi having to do with what Dr. Manfredi told you during the earlier eight visits?

"A: I believe so. Let me look through them.

"Q: Sure, would you?

"A: Let me just look at this. This section.

"Mr. Daly: May I have just a minute, your Honor?

"The Court: You may.

"Q: Doctor, by any chance, these notes were never typed up by anybody?

"A: They were not.

"Q: Do me a favor, would you, read this to me?

"A: Yes. This was from my interview of June 10, 1986. I asked the patient, Dr. Manfredi—

"Q: Excuse me. Are you reading exactly what is on there or are you reading what you recall?

"A. I am reading what is on there.

"Q. Okay.

"A. I asked the patient, in other words, Dr. Manfredi, whether the factual account he gave me a year ago concerning the events leading up to his wife's death and the actual manner of her death were at this time—In other words, at the time I was doing this interview, accurate from his point of view. In other words, i.e., whether he had any significant or substantial changes which he felt needed to be made now in his past account of these events. He assured that—He assured me that his recollection of the events was the same now as it was a year ago.

"Q. Okay. let me take that, if I may, for just a minute. I am taking another piece of paper and that is for the second June visit in '86, right?

"A: That's correct, June 24.

"Q. And am I correct in assuming that in the other papers that you have in front of you are notes that you took on each of eight other times that you saw Dr. Manfredi back in 1985.

"A: That's correct."

ney received information from the prenotice examinations by Zeman "beyond his diagnosis," the defendant does not state, nor does the record reflect, what that information was. The defendant also does not refute the state's contention that any information acquired from Zeman's prenotice examinations concerned collateral matters. The record before us does not demonstrate that the state acquired a windfall of substantive information from Zeman's prenotice examinations of the defendant. "It is incumbent upon an appellant to ensure that we are provided with an adequate record to review the claims of error." *State* v. *Tyler-Barcomb*, 197 Conn. 666, 676, 500 A.2d 1324 (1985), cert. denied, 475 U.S. 1109, 106 S. Ct. 1518, 89 L. Ed. 2d 916 (1986).

The defendant further argues that Zeman's testimony was improperly used during the cross-examination of the defendant. The state may use information obtained through such disclosures and examinations only for the cross-examination or rebuttal of defense testimony. Practice Book § 772.[14] Furthermore, "in any criminal proceeding, Practice Book § 760 bars from admission into evidence on the issue of guilt statements made by the defendant in the course of any examination related to a defense of mental disease or defect." *State* v. *Smith*, 185 Conn. 63, 82–83, 441 A.2d 84 (1981). The transcript of the cross-examination indicates that the defendant did not object to any specific question posed by the state on the ground that the state was using the psychiatric examination improperly. See Practice Book §§ 760, 772. On appeal, the defendant neither indicates how Zeman's testimony was used improperly nor refutes the state's contention that the testimony was used properly under Practice Book § 772 to cross-examine the defendant.

[14] Practice Book § 772 provides in pertinent part: "Information obtained by the prosecuting authority pursuant to Sec. 756 shall be used only for the cross-examination or rebuttal of defense testimony."

Finally, once the defendant placed his mental status in issue by giving notice of his intent to raise the defenses of insanity and extreme emotional disturbance, and once he had presented testimony on that issue at trial, it was constitutionally permissible to subject him to a compulsory psychiatric examination and admit rebuttal evidence on that issue. *United States* v. *Byers*, supra, 1115. It is impossible to distinguish between the unconstitutional testimony that was obtained from the defendant by Zeman pursuant to the court's order of March 26, 1985, and the constitutional testimony obtained from the defendant after he had placed his mental status in issue. The trial court found no substantive difference, nor does the record of Zeman's testimony demonstrate any. " '[T]he focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence.' *Harrington* v. *California*, 395 U.S. 250, 256, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) (Brennan, J., dissenting)"; *State* v. *Gordon*, 185 Conn. 402, 420–21, 441 A.2d 119 (1981), cert. denied, 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982). Given this focus, we are unable to conclude that the trial court's finding that the information elicited by the two examination periods was substantially the same was clearly erroneous.

In light of the court's ruling that the postnotice examinations were not impermissibly tainted by the prenotice examinations, and with no evidence in the record that the two examination periods elicited different information, that they were used by the state to acquire a windfall of substantive information, or used improperly by the state, we are unable to conclude that the defendant has suffered any prejudice from the admission of Zeman's testimony. In these distinct circumstances, we cannot conclude that the defendant has been denied a fair trial. See *State* v. *Lovelace*, supra, 552–55.

II

Relying on Practice Book §§ 760 and 772, the defendant claims that the trial court erred in charging the jury that it could use defense and prosecution psychiatric expert testimony to determine whether the state had proved that the defendant had the requisite intent to commit murder, thereby violating his federal and state constitutional privileges against self-incrimination and his right to a fair trial.

Because the defendant did not except to the charge as given, he seeks review under *State* v. *Evans*, 165 Conn. 61, 327 A.2d 576 (1973), and under the plain error doctrine. We have recently clarified our formulation for an *Evans* review.

" 'We "must ask a series of questions when an *Evans* claim is made and answer each in the affirmative before continuing to the succeeding question." *State* v. *Newton*, 8 Conn. App. 528, 531, 513 A.2d 1261 (1986). "The first two questions relate to whether a defendant's claim is reviewable, and the last two relate to the substance of the actual review." Id.

'First, does the defendant raise an issue which, by its terms, implicates a fundamental constitutional right? This question looks solely to whether the label which the defendant places on the claim is constitutional in nature.

'Second, is the defendant's constitutional claim adequately supported by the record? This question requires that we review the record in a *limited* way and determine, on the basis of that limited review, whether the defendant's claim is truly of constitutional proportions or is simply characterized as such by the defendant. In those instances in which the Supreme Court or this court has already clearly indicated that the particular

claim is or is not of constitutional proportions and therefore reviewable or not reviewable, a summary "yes" or "no" answer may be sufficient.

'Third, "was there, in fact, based on the record, a deprivation of a constitutional right of a criminal defendant?" *State* v. *Newton*, supra. This question requires that we *fully* review the defendant's claim to determine whether a fundamental constitutional right of his was violated.

'Fourth, "did the deprivation deny the defendant a fair trial, thereby requiring" that his conviction be set aside. Id. This question requires that we determine, under appropriate standards of harmless error or other similar doctrines, whether the error requires reversal." ' (Emphasis in original.) *State* v. *Thurman*, 10 Conn. App. 302, 306–307, 523 A.2d 891 (1987)." *State* v. *Huff*, 10 Conn. App. 330, 333–34, 523 A.2d 906, cert. denied, 203 Conn. 809, 525 A.2d 523 (1987); see also *State* v. *Bailey*, 209 Conn. 322, 329–30 n.4, A.2d (1988); *State* v. *Smith*, 209 Conn. 423, 425–27, A.2d (1988).

The defendant, by claiming that the trial court's charge to the jury amounted to a violation of his constitutional privilege not to incriminate himself and his right to due process, has satisfied the first requirement for *Evans* review. See *State* v. *Huff*, supra, 334–35. Our limited review of the record discloses, however, that the defendant's claim is not truly of constitutional proportions, but is simply characterized as such by him.

The defendant's claim that the jury's consideration of testimony by state expert psychiatric witnesses in its determination of whether the state had met its burden of demonstrating that the defendant had the requisite intent to kill violated Practice Book §§ 772 and 760, and his privilege against self-incrimination, is without merit. As evidenced by part I of this opinion, the

defendant waived any fifth amendment claim he may have had with respect to such testimony by placing his mental status in issue. Moreover, once the defendant placed his mental status in issue and presented testimony on that issue at trial, the state could have used information obtained through such disclosures and examinations for the cross-examination or rebuttal of such defense testimony. Practice Book § 772. Practice Book § 760 bars from admission into evidence on the issue of guilt, statements made by the defendant in the course of any examination related to a defense of mental disease or defect. *State* v. *Smith*, supra, 82–83. The rules of practice cited by the defendant, however, do not prohibit, or even apply to, a trial court's charge to the jury on their use of the evidence presented at trial. In fact, inapposite to the defendant's position, "evidence with regard to mental capacity is relevant in any case where a specific intent is an essential element of the crime charged." *State* v. *Burge*, 195 Conn. 232, 240, 487 A.2d 532 (1985); see also General Statutes § 53a-54a (b).[15]

The defendant also argues that the trial court's charge enabled the jury to consider his own evidence presented by Borden on the issue of intent, thereby

[15] General Statutes § 53a-54a provides in pertinent part: "(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

"(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person."

violating his constitutional privilege against self-incrimination and right to due process. We disagree. Once the defendant placed his mental status in issue, "the defendant raised the issue of his mental state for all purposes; thereafter he [can] not . . . determine the ground rules for the determination of his claim." *State* v. *Lovelace*, supra, 551.

"Where counsel . . . seeks to raise on appeal a potential defect in the jury charge which he did not raise at trial, his silence at trial is a powerful signal that, because of the posture of the case, he did not hear the defect in the harmful manner which he presses on appeal, or even if he did so hear it, he did not deem it harmful enough to press in the trial court.[16] When the principal participant in the trial whose function it is to protect the rights of his client does not deem an issue harmful enough to press in the trial court, the appellate claim that the same issue clearly deprived the defendant of a fundamental constitutional right and a fair trial; *State* v. *Cosby*, [6 Conn. App. 164, 172, 504 A.2d 1071 (1986)]; is seriously undercut. See also *State* v. *Kurvin*, 186 Conn. 555, 567, 442 A.2d 1327 (1982) ('We cannot ignore the fact that the defendant saw no reason to take exception to an instruction which he now claims is misleading')." (Footnote added.) *State* v. *Huff*, supra, 338. Under the circumstances of this case, therefore, we decline to review the defendant's claim further under *Evans*.

The defendant also argues that his claim is reviewable under the plain error doctrine. There is, however,

[16] "We recognize that the silence may also simply reflect inadvertence by counsel. That possibility is not enough to warrant appellate review. The policies behind the ruling requiring claims to be raised at trial are strong and sound. See *State* v. *Cosby*, 6 Conn. App. 164, 173, 504 A.2d 1071 (1986). Furthermore, due process requires a fair trial, not a perfect one. *State* v. *Kurvin*, 186 Conn. 555, 565, 442 A.2d 1327 (1982)." *State* v. *Huff*, 10 Conn. App. 330, 338, 523 A.2d 906, cert. denied, 203 Conn. 809, 525 A.2d 523 (1987).

no plain error in this case. The jury instructions did not create a manifest injustice to the defendant so as to impair the effectiveness and integrity of the trial. *State* v. *Utz*, 201 Conn. 190, 202, 513 A.2d 1191 (1986); *State* v. *Huff*, supra, 339. The instructions neither vitiated the fundamental integrity of the adjudicative process nor worked a fundamental injustice. *State* v. *Huff*, supra; *State* v. *Cosby*, supra, 172.

III

The defendant next claims that his right to assistance of counsel under the state[17] and federal constitution was violated when the trial court denied his motion to have counsel present at the court ordered psychiatric examinations. Our recent decision in *State* v. *Johnson*, 14 Conn. App. 586, 588–95, 543 A.2d 740 (1988), held that a defendant does not have a sixth amendment right to the presence of counsel at a psychiatric interview.

Although a defendant may have a sixth amendment right to assistance of counsel "*before* submitting to the pretrial psychiatric interview"; (emphasis added) *Estelle* v. *Smith*, supra, 469; *United States* v. *Byers*, supra, 1119; *State* v. *Johnson*, supra, 589–90; "[t]he [Supreme] Court [has] specifically disavowed any implication of a 'constitutional right to have counsel actually present *during* the examination. . . .' [*Estelle* v. *Smith*, supra,] 470 n.14." (Emphasis added.) *United States* v. *Byers*, supra; see id., n.14.

"Even if counsel were uncharacteristically to sit silent and interpose no procedural objections or suggestions, one can scarcely imagine a successful psy-

[17] Although the defendant refers to both the federal and state constitutions, he offers no separate analysis of the Connecticut constitution as a basis for different treatment of the federal and state claims. We therefore see no reason to undertake such an analysis. *State* v. *Bowden*, 15 Conn. App. 539, 543 n.2, 545 A.2d 591 (1988); *State* v. *Cosby*, 6 Conn. App. 164, 166 n.1, 504 A.2d 1071 (1986).

chiatric examination in which the subject's eyes move back and forth between the doctor and his attorney. Nor would it help if the attorney were listening from outside the room, for the subject's attention would still wander where his eyes could not. And the attorney's presence in such a purely observational capacity, without ability to advise, suggest or object, would have no relationship to the sixth amendment's [guarantee to the assistance of counsel]." Id., 1120; *State* v. *Johnson*, supra, 591. Relying on *Estelle*, *Byers* and *Johnson*, we conclude that the defendant did not have a sixth amendment right to the presence of counsel at the court ordered psychiatric examination.

IV

The defendant's final claim is that his state[18] and federal constitutional right to assistance of counsel were likewise violated when the trial denied his request to have the psychiatric examinations recorded in the absence of his counsel's actual presence. Specifically, the defendant argues that the recording of a psychiatric examination is constitutionally mandated in order for counsel effectively to preserve and assert the defendant's rights both before and during trial.

"Whatever the feasibility of such a practice, [there is] no basis for it in the Sixth Amendment. Its only utility would be to record events . . . that are otherwise difficult to reconstruct. But as [*United States* v.] *Ash*, [413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973)] made completely clear, 'lack of scientific precision and inability to reconstruct an event are not the tests' for application of the Sixth Amendment guarantee. [(Footnote omitted.) *United States* v. *Ash*, supra,] 316. They are not the tests because preservation of evidence for trial is not the Amendment's purpose . . . . Using

[18] See footnote 17, supra.

the guarantee of counsel for the purpose of preserving evidence would make '[a] substantial departure from the historical test,' and convert the Sixth Amendment into 'a generalized protection of the adversary process.' [Id.], 317. . . . [T]he suggestion of recording as a substitute for assistance of counsel . . . makes the consideration of one constitutional guarantee the occasion for creation of limitations that serve an entirely unrelated constitutional purpose." (Citations omitted.) *United States* v. *Byers*, supra, 1120–21.

The constitutional rights of a criminal defendant under the sixth amendment and the due process clause are secured if "the defendant has the opportunity to contest the accuracy of witnesses' testimony by cross-examining them at trial, and introducing his own witness in rebuttal." Id., 1121; *State* v. *Johnson*, supra, 592–93. The defendant does not claim that he was denied the opportunity to cross-examine the state's expert psychiatric witnesses and to introduce his own rebuttal witnesses. We find the reasoning of *Byers* persuasive, and conclude that the sixth amendment guarantee to assistance of counsel does not require a court compelled psychiatric examination to be recorded.

There is no error.

In this opinion the other judges concurred.

APPENDIX C

Orders Re: Motions For Rehearing Filed With Connecticut Appellate and Supreme Courts

STATE OF CONNECTICUT
APPELLATE COURT

A.C. 5693
STATE OF CONNECTICUT

V.

RUSSELL F. MANFREDI : April 6, 1989

ORDER

THE MOTION OF THE DEFENDANT, FILED MARCH 17, 1989, FOR REARGUMENT,

HAVING BEEN PRESENTED TO THE COURT IT IS HEREBY
O R D E R E D denied.

BY THE COURT,

[signed] Michele T. Angers
1ST ASSISTANT CLERK
APPELLATE [COURT]

[Notices omitted]

the guarantee of counsel for the purpose of preserving evidence would make '[a] substantial departure from the historical test,' and convert the Sixth Amendment into 'a generalized protection of the adversary process.' [Id.], 317. . . . [T]he suggestion of recording as a substitute for assistance of counsel . . . makes the consideration of one constitutional guarantee the occasion for creation of limitations that serve an entirely unrelated constitutional purpose." (Citations omitted.) *United States* v. *Byers*, supra, 1120–21.

The constitutional rights of a criminal defendant under the sixth amendment and the due process clause are secured if "the defendant has the opportunity to contest the accuracy of witnesses' testimony by cross-examining them at trial, and introducing his own witness in rebuttal." Id., 1121; *State* v. *Johnson*, supra, 592–93. The defendant does not claim that he was denied the opportunity to cross-examine the state's expert psychiatric witnesses and to introduce his own rebuttal witnesses. We find the reasoning of *Byers* persuasive, and conclude that the sixth amendment guarantee to assistance of counsel does not require a court compelled psychiatric examination to be recorded.

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O R D E R E D denied.

BY THE COURT,

[signed] Michele T. Angers
1ST ASSISTANT CLERK
APPELLATE [COURT]

[Notices omitted]

STATE OF CONNECTICUT
SUPREME COURT

NO. 13706

STATE OF CONNECTICUT

V.

RUSSELL F. MANFREDI : MARCH 1, 1990

ORDER

THE MOTION OF THE DEFENDANT, FILED FEBRUARY 9, 1990, FOR REARGUMENT, HAVING BEEN PRESENTED TO THE COURT IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

[signed] Francis J. Drumm, Jr.
CHIEF CLERK

[Notices omitted]

CONSTITUTIONAL, STATUTORY AND PRACTICE BOOK PROVISIONS INVOLVED IN THIS CASE

APPENDIX D

CONSTITUTION OF THE UNITED STATES

Fifth Amendment

No person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ....

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment

Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law ...

Connecticut General Statutes

Sec. 53a-13. Lack of capacity due to mental disease or defect as affirmative defense.

(a) In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law.

(b) It shall not be a defense under this section if such mental disease or defect was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating

liquor or any drug or substance, or any combination thereof, unless such drug was prescribed for the defendant by a licensed practitioner, as defined in section 20-184a, and was used in accordance with the directions of such prescription.

(c) As used in this section, the terms mental disease or defect do not include (1) an abnormality manifested only by repeated criminal or otherwise antisocial conduct or (2) pathological or compulsive gambling.

Sec. 53a-54a. Murder defined. Affirmative defenses. Evidence of mental condition. Classification.

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress of deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

Connecticut Practice Book

Sec. 758. Disclosure by the Defendant--Defense of Mental Disease or Defect--Notice by Defendant

If a defendant intends to rely upon the defense of mental disease or defect at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions

pursuant to Sec. 811 or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this section, mental disease or defect may not be raised as a defense. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

Sec. 759. Disclosure by the Defendant--Defense of Mental Disease or Defect--Mental Disease or Defect Inconsistent With the Mental Element Required for the Offense Charged

If a defendant intends to introduce expert testimony relating to a mental disease or defect, or another condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. He shall also furnish the prosecuting authority with copies of reports of physical or mental examinations of the defendant made in connection with the offense charged, within five days after receipt thereof. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

Sec. 760. Disclosure by the Defendant--Defense of Mental Disease or Defect--Psychiatric Examination

In an appropriate case the judicial authority may, upon motion of the prosecuting authority, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the defendant in the course of any

examination provided for by Sec. 757, whether the examination shall be with or without the consent of the defendant, shall be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding. A copy of the report of the psychiatric examination shall be furnished to the defendant within a reasonable time after the examination.

Sec. 761. Disclosure by the Defendant--Defense of Mental Disease or Defect--Failure to Comply

If there is a failure to give notice or to furnish reports when required by Sec. 759 or to submit to an examination when ordered under Sec. 760, the judicial authority may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state.

Sec. 772. Disclosure by the Defendant--Admissibility at Time of Trial

The fact that the defendant has indicated an intent to offer a matter in evidence or to call a person as a witness pursuant to Sec. 756 is not admissible in evidence at his trial. Information obtained by the prosecuting authority pursuant to Sec. 756 shall be used only for the cross-examination or rebuttal of defense testimony.

Sec. 811. Pretrial Motion Practice--Failure to Raise Defense, Objection or Request

Unless otherwise provided by these rules or statute, all pretrial motions or requests shall be made not later than ten days after the entry of a plea in the court where the case will be tried, or, for good cause shown, at such later time as the judicial authority may fix. However, defenses and objections alleging lack of jurisdiction over the offense charged or failure of the indictment or information to charge an offense may be raised by the defendant or noticed by the judicial authority at any time during the pendency of the proceedings.

Sec. 852. Submission for Verdict--Necessity for Requests to Charge and Exceptions

The supreme court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of objection. Upon request, opportunity shall be given to present the exception out of the hearing of the jury.

Sec. 2000. Applicable Sections of Supreme Court Rules

The practice and procedure for appeals to the appellate court shall conform to the rules of practice governing appeals to the supreme court except where a particular practice or procedure is specified by the rules of the appellate court....

APPENDIX E

Excerpts of The Record Below Material To Petitioner's Claims

NO. 51204	SUPERIOR COURT
STATE OF CONNECTICUT	HARTFORD/NEW BRITAIN J.D.
VS.	AT HARTFORD
RUSSELL F. MANFREDI	OCTOBER 21, 1986

[DEFENDANT'S] REQUEST TO CHARGE

* * * *

3. "in this case evidence has been introduced bearing on the issue of whether the defendant is entitled to the defense of mental disease or defect. (Please note that our law does not use the colloquial term "insanity" -- that term which you may have heard in popular use, is not the proper term, and I request that you put it, and any connotations it may carry with it, out of your mind.) This requires, then, that I instruct you on the law of the defense of mental disease or defect.

If you find that the state has proven all the elements of the crime charged, namely (murder), your task will not be over. You must then go on to decide whether the defendant is entitled, under the evidence and the rules of law which I will define for you, to the defense of mental disease or defect. If, however, you find that the state has not proven all of the elements of the crime charged, you need not consider this defense, and your verdict would be not guilty.

(Before I discuss this defense, I want to note one

thing which you should keep in mind. You will recall that there was evidence through Dr. Walter Borden, the defendant's expert witness, of the defendant's account or version of what occurred. As I indicated to you at the time this evidence was presented, you should consider this evidence, not on the issue of whether the defendant did commit the act or acts which the state claims he did, but only as bearing on the basis of Dr. Walter Borden, opinion as to the defendant's state of mind at that time.)

Our statute on the defense of mental disease or defect, insofar as it applies to this case, provides as follows: "In any prosecution for an offense, it shall be an *[sic]* defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law. The terms mental disease or defect do not include an abnormality manifested only by repeated or otherwise antisocial conduct."

Before I discuss the meaning of this statute with you, I want to discuss the burden of proof on this issue. As I told you before, generally in a criminal case the burden of proof is on the state to prove the defendant guilty beyond a reasonable doubt. This statute involves, however, an exception to that general rule. The law requires that the State prove the defendant was sane beyond a reasonable doubt.

I will now discuss with you the elements of the defense of mental disease or defect. There are three elements to this defense: (1) that at the time the defendant committed the proscribed act or acts, (2) he had a mental disease or defect, and (3) that, as a result

of that mental disease or defect, he lacked substantial capacity either (a) to appreciate the wrongfulness of his conduct, or (b) to control his conduct within the requirements of the law. I will not go through these elements one by one and in detail with you.

* * * *

6. "In this case evidence has been introduced bearing on the issue of whether the defendant is entitled to the defense of extreme emotional disturbance. This requires, then, that I instruct you on the law of the defense of extreme emotional disturbance.

If you find that the state has proven all the elements of the crime charged, namely murder, your task will not be over. You must then go on to decide whether the defendant is entitled, under the evidence and the rules of law which I will define for you, to the defense of extreme emotional disturbance. If, however, you find that the state has not proven all of the elements of the crime charged, you need not consider this defense, and your verdict would be not guilty.

(Before I discuss this defense, I want to note one thing which you should keep in mind. You will recall that there was evidence through Doctor Walter Borden, the defendant's expert witness, of the defendant's account or version of what occurred. As I indicated to you at the time this evidence was presented, you should consider this evidence, not on the issue of whether the defendant did commit the act or acts which the state claims he did, but only as bearing on the basis of what Doctor Walter Borden's opinion as to the defendant's state of mind at that time.)

Our statute on the defense of extreme emotional

disturbance, insofar as it applies to this case, provides that in any prosecution for murder "it shall be an *[sic]* defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances that the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

This statute, then, means that, when a person is charged with murder the jury may, under appropriate circumstance, find him guilty of the lesser included offense of manslaughter in the first degree by reason of extreme emotional disturbance, rather than guilty of murder. (This defense is different from the defense of mental disease or defect, which I explained to you earlier. That defense is a complete defense to criminal liability and, if the defendant establishes it, results in a verdict of not guilty be reason of mental disease or defect.) This defense -- of extreme emotional disturbance -- is a defense to the charge of murder, but it does not result in a verdict of not guilty; it results, instead in a verdict of not guilty; it results, instead in a verdict or guilty of manslaughter in the first degree. Thus, it reduces the crime of murder to the crime of manslaughter in the first degree.

This defense relates to the defendant's state of mind at the time he killed the victim Catherine B. Manfredi. You will recall that one of the elements of the crime of murder is that the actor intended to cause the death of another person. Extreme emotional disturbance does not negate, does not wipe out, that

intent. It serves merely to explain reasonably the circumstances leading the the *[sic]* formation of that intent. Its purpose is to render the actor less culpable, less blameworthy, because his intentional acts were caused by extreme emotional disturbance.

The law requires that the State prove that the defendant was sane beyong *[sic]* a reasonable doubt.

* * * *

Excerpts of Judge's Charge to Jury from Transcript dated 10/23/86 and 10/28/86

T. 3021

* * * *

Whether or not the defendant had a mental disease or defect is a question of fact for you to decide on the basis of all the evidence, expert and non-expert, which would bear on the issue. The words sane, sanity and insanity used in these instructions are legal terms, and are not meant to describe anything other than a standard of mental disease or defect set out in the statute which bars criminal responsibility.

If you find that the defendant has proved to you by a preponderance of the evidence that at the time Catherine Manfredi's death was caused, he lacked substantial capacity as a result of mental disease or illness, either to appreciate the wrongfulness of his act or to control his conduct within the requirements of law, you must find the defendant not guilty by reason of mental disease or defect. If you so find, you may end your deliberations at that point and return your verdict, since it would apply to any criminal statute.

If, on the other hand, you find that the (T. 3022)

defendant has failed to prove that issue to you by a preponderance of the evidence, you may use this evidence as to mental disease or defect as you consider all of the other evidence in this case in determining whether the state has proved the intent necessary to commit the offense, including that which was charged on murder, intent to cause her death.

Now, the nature of the evidence to consider here would be the two psychiatrist's *[sic]* testimony, which is Doctor Borden and Doctor Zeman, and the psychologist, Doctor Phillips, and likewise the testimony given concerning his past history by his family and friends, and those who testified about his condition subsequent to the occurrence.

* * * *

(T. 3053) THE COURT: Ladies and gentlemen, I have called you out to correct some apparent misconceptions you may have concerning my instructions. In instructing on the affirmative defense of insanity, apparently I indicated some limited nature of the evidence that you should apply in that situation, but (T. 3054) you will recall at the end of my instruction that you are to apply all the evidence on all the questions, and the only reason for me indicating the nature of the evidence that you should apply is to attempt to emphasize where you would look for evidence. So, whenever I've said that to you, I am trying to illustrate my instructions, it means in the end you use all the evidence that is before you.

There is some question as to whether or not I was attempting to limit you only to the expert's evidence as to the question of mental state; but as I recall, I indicated both expert and non-expert evidence should be used by you, and as a factual situation for you. So, you're the ones to determine under the facts, and recall also my instructions concerning the way you handle expert testimony.

* * * *

(T. 3085) If you find that the defendant has proved to you by a preponderance of the evidence that at the time Catherine Manfredi's death was caused, he lacked substantial capacity as a result of mental disease or defect either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law, you must find him not guilty by reason of mental disease or defect. If you so find, you end your deliberation and return that as your verdict, since it would apply to any criminal activity at that time, the mental state negating the intent of his act.

If on the other hand, you find that the defendant has failed to prove that issue to you by a preponderance of the evidence, you must use this evidence as to mental disease or defect when you consider all the other evidence in this case in determining whether the state has proved the intent required to commit the offense, including that which I (T. 3086) have charged on murder, the intent to cause the death.

* * * *

No. 89-1907

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

RUSSELL F. MANFREDI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

To Be Argued By:

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QUESTIONS PRESENTED

I. WHEN A CRIMINAL DEFENDANT HAS PLACED HIS MENTAL CAPACITY AT ISSUE CAN THE STATE USE THE RESULTS OF A COURT ORDERED PSYCHIATRIC EXAMINATION OF THAT DEFENDANT FOR THE SOLE PURPOSE OF REBUTTING ANY PSYCHIATRIC DEFENSES PERMITTED UNDER STATE LAW WITHOUT VIOLATING THE DEFENDANT'S FIFTH AMENDMENT RIGHTS?

II. WHERE A DEFENDANT INTERPOSES A DEFENSE TO A MURDER CHARGE CLAIMING HE LACKED THE MENTAL CAPACITY TO FORM INTENT BECAUSE OF A MENTAL DISEASE OR DEFECT, CAN HE GAIN REVIEW OF HIS UNPRESERVED CLAIM THAT THE JURY SHOULD NOT HAVE BEEN GIVEN ANY INSTRUCTION ABOUT THE USE OF PSYCHIATRIC TESTIMONY IN DETERMINING WHETHER HE HAD A MENTAL DISEASE OR DEFECT THAT INTERFERED WITH HIS ABILITY TO FORM INTENT?

III. DOES A DEFENDANT HAVE A SIXTH AMENDMENT RIGHT TO COUNSEL'S PRESENCE DURING A COURT ORDERED PSYCHIATRIC EXAMINATION PURSUANT TO UNITED STATES V. ASH. 413 U.S. 300 (1973) AND UNITED STATES V. WADE, 388 U.S. 218 (1967)?

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STATEMENT OF THE CASE

Respondent relies on the statement of the case set forth by the Connecticut supreme court in State v. Manfredi, 213 Conn. 500, 401-509 (1990), and reproduced in petitioner's appendix at pages 2A to 10A for the first question presented. As to the remaining questions presented, respondent sets forth the following.

"At trial, the [petitioner] took the stand and admitted that he had, in fact killed his wife. The defense therefore focused almost exclusively on his claims of insanity and extreme emotional disturbance." State v. Manfredi, Pet. App. 7A-8A.[1]

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[1]. Both of these are affirmative defenses under Connecticut law resulting in a defendant carrying the burden of

(continued...)

With these defenses as the contested issues in the case, the trial court instructed the jury that the state had the burden of proving each element of the crime beyond a reasonable doubt. It cautioned the jury that, despite the petitioner's admission that he caused his wife's death, the burden of proof on each element of the crime remained with the state. The jury was told to return a verdict of not guilty if the state failed to meet its burden of proof beyond a reasonable doubt.

After hearing the elements of murder, the jury was instructed on insanity and the petitioner's burden of proof on it. Immediately thereafter,

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[1](...continued)
proof on each defense raised. Connecticut General Statutes §§ 53a-13; 53a-54a. Pet. App.1D-2D.

the trial court informed the jury that even if the petitioner did not meet his burden of proof on the insanity defense it could still consider the psychiatric evidence to determine whether the state established intent beyond a reasonable doubt. The jury was then instructed on the affirmative defense of extreme emotional disturbance.

As required by Connecticut practice; Connecticut Practice Book § 852; petitioner raised several objections to the instruction. There was no objection, however, to the fact that the instruction which is now challenged on appeal was given. Respondent's App. at B1-B13. Instead petitioner requested a clearer and more expansive statement about the state's burden of proving beyond a reasonable doubt "that there

wasn't any defect present or any other obstruction present that made it impossible for the actor, in this case the [petitioner], to form an intent; and that that obligation... is on the state...beyond a reasonable doubt." Resp. App. B8-B9. At the trial court's request, petitioner reiterated his complaint that the jury was not instructed on the state's burden of proving that petitioner's mental defect did not interfere with his ability to form the requisite intent. Resp. App. at B14-15. The trial court was willing to clarify this point. Resp. App. B15, B17.

In its supplemental instruction, the trial court told the jury it must apply the psychiatric evidence "to the question of whether or not the state has disproved the question of insanity where

that is necessary." Resp App. B-20. The court went on to state:

> And if, however, you find that you have a doubt as to the mental condition of insanity or the [petitioner's] mental condition of having a mental disease or defect [sic] in that connection, the state has the burden of proving each element of the crime which would include that.

Resp App. B20-21. There was no objection to this instruction. Thereafter, the jury returned its verdict, finding the petitioner guilty of manslaughter in the first degree under extreme emotional disturbance. Connecticut General Statutes §53a-54a(a); 53a-55(a)(2). Resp. App. A2, A5.

CONNECTICUT APPELLATE PROCEEDINGS

Petitioner appealed his conviction, as a matter of right, to the Connecticut appellate court. As to the first question presented, the appellate court

found error in the trial court's determination that this was "an appropriate case" under Connecticut Practice Book §760 Resp. App. A5; to order a psychiatric examination on behalf of the state, deciding instead that said order was premature. State v. Manfredi, 17 Conn. App. 602, 613 (1989); Pet. App. 12B. It further held, however, that the error was harmless. Pet App. 16B-19B.

The appellate court refused to review the merits of the second question presented because petitioner failed to preserve it properly under state procedural rules. Pet. App. 20B-24B.

The appellate court also ruled that petitioner had no sixth amendment right to either counsel's presence at or a recordation of a psychiatric examination

ordered under Connecticut Practice Book § 760.

Petitioner raised all three claims in a petition for certification to the Connecticut supreme court. Pet. App. 9A n.9. The supreme court granted certification limited to the following issue:

> Did the appellate court err in sustaining the admission of expert psychiatric testimony elicited by the state in advance of the filing of notice of intent to rely on a defense of mental disease or defect?

Pet. app. 3A n 2. Respondent reserved the following issue for review:

> Whether this was an appropriate case under Practice Book § 760 for the trial court to order a psychiatric examination prior to the defendant's assertion of a mental disease or defect under Practice Book § 759?

Id. The supreme court reversed the appellate court's ruling but upheld its judgment: holding that the trial court ordered the psychiatric examination at an appropriate time. Pet. App. 15A.

REASONS FOR DENYING THE PETITION

IA. AS TO THE USE OF THE COURT ORDERED PSYCHIATRIC EXAMINATION, THE CONNECTICUT SUPREME COURT DID NOT DECIDE A FEDERAL QUESTION.

This Court's rules augur against granting certiorari where the state's highest court has not decided a federal question. 10.1 (b). In this case, the Connecticut supreme court decided, in the first instance, that "an appropriate case" for a court to order a psychiatric examination under Connecticut Practice Book §760 [2] included those instances where a defendant has not yet asserted a recognized insanity defense. Pet. App. 10A-11A. A state supreme court is

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2. Connecticut's practice book sections dealing with notice of psychiatric defenses and court ordered psychiatric examinations of a defendant are derived from and almost a mirror image of Rule 12.2(c) Fed. R. of Crim. Pro. Orland, Connecticut Practice Annotated §760.

the final arbiter of the meaning of its own rules, and its determination does not present a federal question worthy of certiorari review.

With this issue decided, the Connecticut supreme court then affirmed the petitioner's conviction by analyzing the his conduct in light of Connecticut Practice Book § 760. The court determined that the petitioner "had placed his mental status at issue before the trial court ordered him to undergo psychiatric examination." Pet. App. 15A.

Contrary to the petitioner's assertion, this holding did not resolve a unique federal constitutional question. This court has indicated repeatedly that once a defendant places his mental capacity at issue a trial court may

order a psychiatric examination, and the state may use the results of the examination to rebut mental status defenses without infringing on a defendant 's Fifth Amendment rights. Buchanan v. Kentucky, 483 U.S. 402, 421-424 (1987); Estelle v. Smith, 451 U.S. 454, 466-67, (1981); see also Powell v. Texas, U.S. , 109 S. Ct. 3146, 3149 (1989).

The Fifth Amendment question petitioner is attempting to latch onto, which was left open by Estelle v. Smith, is whether the state can use the results of a psychiatric examination ordered before a defendant places his mental status at issue without violating the defendant 's Fifth Amendment rights. 451 U.S. at 457 n.1. However, neither Estelle nor any subsequent decision of

this court presents a bar to using the results of a psychiatric examination ordered after a defendant places his mental status at issue. That the Connecticut court avoided the Fifth Amendment issue left open in Estelle v. Smith is expressly revealed by the decision below. Pet. App. at 15A N.12.

Therefore, the Connecticut supreme court did no more than apply the facts of the case to the terms of the Connecticut Practice Book within well established constitutional parameters. In light of the supreme court's failure to decide a unique federal question, this Court should not grant certiorari on the first question presented. Rule 10.1(c).

Finally, both the appellate court, and one justice of the supreme court held that the state's psychiatrist

learned the same information from the "proper" post-notice psychiatric examinations as he did from the "improper" pre-notice examinations. Pet App. at 25A; 19B. Thus, even if there was constitutional error in the supreme court's interpretation of Connecticut Practice Book § 760, any such error was harmless to petitioner.

B. The Decision Below Is Consistent With Decisions Of This Court And Federal Courts Of Appeal

Even if this court were to conclude that the Connecticut court reached the Fifth Amendment issue as framed above, there is no need for further review. This court reserves its valuable time for those cases wherein the state's highest court decides a federal question in a manner inconsistent with this court or other federal courts of appeal. Rule

10.1(b) & (c). No such conflict is presented by this question.

Last year, this Court indicated that a petitioner has no valid Fifth Amendment claim when the results of his pre-notice examination are used in response to a defense of mental disease or defect. Powell v. Texas, supra, 3149. This conclusion was consistent with and suggested by prior decisions of this court which distinguish between the impermissible use of examination results against a defendant who does not interpose a psychiatric defense; Estelle v. Smith, supra, 1875 and the permissible use of examination results against one who asserts such a defense. Buchanan v. Kentucky, supra, 2917-18).[3]

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3. "'A criminal defendant, who neither initiates psychiatric evaluation (continued...)

Moreover, federal courts have consistently upheld, albeit for various reasons, the use of information from compelled psychiatric examinations to rebut psychiatric defenses raised at trial.[4] United States v. Byers, 740 F. 2d 1104, 1111-1113 (plurality opinion)

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[3](...continued)
nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist and his statements cannot be used against him at a capital sentencing proceeding.' [Estelle v. Smith], 468, 102 S. Ct. at 1875. This statement logically leads to another proposition: if a defendant requests such an examination or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." Buchanan v. Kentucky, supra at 2917-18.

[4]. A more exhaustive discussion of the various rationales rejecting the Fifth Amendment claim proffered by the petitioner is found in United States v. Byers, 740 F. 2d 1104, 1111-1113 (D.C. Cir. 1984).

(Scalia, J.) (Fairness to government); United States v. Stockwell, 743 F. 2d 123, 126 (2d Cir 1984) (Where use of examination limited to rebutting psychiatric claim, no Fifth Amendment entanglements); United States v. Madrid, 673 F. 2d 1114, 1121 (10th 1982) (Once defendant offers insanity evidence psychiatric testimony on behalf of the government cannot be muzzled on 5th amendment grounds);[5]

The legitimacy of a compelled examination is unaffected by when in the proceedings the initial order is made. United States v. Henderson 770 F.2d 724, 728 n.4 (8th Cir. 1984) (district court

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[5] In accord: United States v. Cohen, 530 F. 2d 43,47 (5th Cir) cert denied, 429 U.S. 855 (1976); United States v. Trapnell, 495 F. 2d 22, 24 (2d Cir. 1976); See also United States v. Malcolm, 475 F. 2d 420, 427 (9th Cir. 1973).

has authority to order a contemporaneous psychiatric examination); United States v. Reason, 549 F.2d 309 (4th Cir. 1977) (where defendant requests a psychiatric examination to determine competency court may order a dual purpose for competency and sanity); United States v. Lincoln, 542 F.2d 746 (8th Cir.), cert. denied, 429 U.S. 1106 (1976) (district court had authority to order a dual purpose examination despite fact that defendant had yet to declare an intention to raise an insanity defense);

[6] It is the uses to which the defendant's statements (made during the

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[6] United States v. Reifsteck, 535 F.2d 1030 (8th Cir. 1976) ; United States v. Moudy, 462 F.2d 694 (5th Cir. 1972); Winn v. United States, 270 F.2d 326 (D.C. Cir. 1959); United States v. Hinckley, 525 F.Supp. 1342 (D.D.C. 1981), aff'd, 672 F.2d 115 (D.C. Cir. 1982)

examination) are put and not the timing of the examination which determines whether the defendant's protection against self-incrimination has indeed been violated. See United States v. Leonard, 609 F. 2d 1163, 1165 (5th Cir. 1980).

These decision unanimously support the Connecticut supreme court's conclusion that once petitioner placed his mental status in issue, the state was entitled to use the results of all psychiatric and psychological tests to rebut the defense without implicating petitioner's Fifth Amendment rights.[7]

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[7] Indeed, by decreeing that extreme emotional disturbance and insanity are affirmative defenses, Connecticut has constitutionally shifted the burden of proof on these issues to the defendant. Patterson v. New York, 432 U.S. 197, 211 (1977). Where statements are not used for an incriminating purpose, petitione-

(continued...)

Under the facts of this case, where petitioner places his mental status at issue early in the proceedings, admits to the killing, relies solely on psychiatric defenses, and offers detailed psychiatric testimony, there is no conflict among the decisions of this Court or the circuits about permitting the use of the results a court ordered examinations to rebut the psychiatric defenses presented. Certiorari should not be granted on the first question presented.

II WHERE PETITIONER DOES NOT COMPLY WITH STATE PROCEDURAL RULES HE SHOULD NOT GET REVIEW OF HIS JURY INSTRUCTION CLAIM

Along with the insanity defense, a Connecticut murder defendant may also claim that he suffered from a mental

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[7](...continued)
r's Fifth Amendment rights are not implicated.

disease or incapacity which rendered him incapable of forming the specific intent to murder. Connecticut General Statutes §53a-54(a) Connecticut Practice Book § 759, Resp. App. A5-A6. The state bears the ultimate burden of proving intent beyond a reasonable doubt.

The appellate court noted correctly that petitioner failed to take an exception to the instruction that the psychiatric evidence could be considered on whether petitioner had the mental capacity to form intent. Connecticut Practice Book § 852. Pet. App. at 20B. Contrary to petitioner's argument; Pet. at 19; his response to the jury instructions given at trial makes it very apparent that he wanted to take full advantage of this defense to murder. Petitioner encouraged the giving of and was satisfied

with the trial court's final instruction on the state's burden of overcoming any mental disease and defect on its way to proving intent. Resp. App.B8-9; B14.

Therefore, the Connecticut appellate court acted appropriately when it invoked the state's procedural bar rule, as enunciated in State v. Evans, 165 Conn. 61 (1973), and refused to entertain the merits of his belated challenge to the jury instruction. Pet. App. 20B-24B. "Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court..." Michigan v. Tyler, 436 U.S. 509, 512, n.7 (1978); compare, Connecticut v. Johnson, 460 U.S. 73, 80, n. 8 (1983)(Where state court grants review under State v.

Evans, supreme court can consider federal question). Certiorari shculd not be granted for this unpreserved claim. Ellis v. Dixon, 349 U.S. 458, 474, (1955).[8]

III. THE CIRCUITS HAVE UNANIMOUSLY REJECTED A CLAIM THAT DEFENDANT'S HAVE A SIXTH AMENDMENT RIGHT TO COUNSEL AT A COURT ORDERED PSYCHIATRIC EXAMINATION

Petitioner claims that he has a Sixth Amendment right to counsel's presence at a psychiatric examination

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[8] On this issue, it is of no consequence that the government must prove the defendant capable of forming the requested intent. This is established by looking at federal decisions which pre-date the Insanity Defense Reform Act Pub. L. 98-473, Title II §402 (a). United States v. Freeman, 804 F 2d 1574 (11th Cir. 1986). In those days, courts allowed the use of compelled psychiatric examinations to rebut the mental defense raised by a defendant even though the government had the burden of proof on the issue of sanity. United States v. Byers, 740 F2d 1104, 1111,-1114 (D.C. Cir. 1984) (and cases cited therein).

because it is a "critical stage" of the proceedings." Pet at 25. He argues that counsel's presence and passive observation will enhance his ability to attack the examination and the psychiatric conclusions at trial. Pet at 28-29. The "critical stage" analysis proposed is derived from this court's decisions in United States v. Ash, 413 U.S. 300 (1973) and United States v. Wade, 388 u.S. 218 (1967). His claim is not worthy of certiorari.

Although this Court has yet to decide whether a defendant has a Sixth Amendment right to counsel's presence at a court ordered psychiatric examination, it has indicated a favorable disposition towards the resolution of this claim by lower federal courts. Estelle v. Smith, at 470,n 14. Every federal court which

has considered this issue has agreed that no such right exists under the Sixth Amendment. Williams v. Lynaugh, 809 F. 2d 1063 (5th Cir.) cert. denied, 107 S. Ct. 1635 (1987); United States v. Byers, supra, (plurality opinion); Cape v. Francis, 741 F. 2d 1287 (11th Cir. 1984); Hollis v. Smith, 571 F. 2d 685 (2d Cir. 1978); United States v. Greene, 497 F. 2d 1068 (7th Cir 1974) cert denied 420 U.S. 909 (1971).[9] See also 3 A.L.R. 4th, 910 at 920. Where there is no conflict in the federal decisions on an issue this Court has no

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[9]. Many of these circuits have decided this issue more than once, all finding no Sixth Amendment right to counsel's presence at a court ordered examination. i.e. Vardas v. Estelle, 715 F. 2d 1287 (5th Cir 1983) cert. denied 465 U.S. 1104 (1984); United States v. Baird, 414 F. 2d 700 (2d Cir. 1969) cert. denied 396 U.S. 1005.

reason exercise its discretionary jurisdiction. Rule 10.1(b).

Petitioner's attempt to create conflict where none exists, by citing several cases recognizing the right he claims under the Sixth Amendment, does not support his request for certiorari. Pet. at 22. n. 21. For instance, Lee v. County Court of Erie, 267 N.E. 2d 452 (NY 1971) was decided between this Court's decisions in Wade and Ash. As explained in Byers, this Court's decision in Ash rejected any notion in Wade that the purpose of counsel's presence at pre-trial proceedings was to permit reconstruction of these events at trial. United States v. Byers, supra, 1117.

Sheppard v Bowe, 442 P.2d 238 (Or. 1968), also cited by petitioner, re-

quired counsel's presence on Fifth rather than Sixth Amendment grounds. The strictly limited use of statements from psychiatric examination found in Connecticut Practice Book §760 negates any concern that petitioner's Fifth Amendment rights need protection. State v. Boscarino, 206 Conn. 714, 736-737, 529 A. 2d 1260 (1987).

Houston v. State, 602 P. 2d 784, (Alaska 1979) is a decision invoking Alaska's state constitution. See Also State v. Jackson, 298 S. E. 2d 866, 872(W.VA. 1982). State's are free to afford their citizens greater protections than those granted under our federal constitution. Michigan v. Long, 463 U.S. 1032,1037-38 (1983). By construing their constitutions more expansively, however, a state does not bring

its highest court into conflict with the federal judiciary deciding the same questions under federal law.

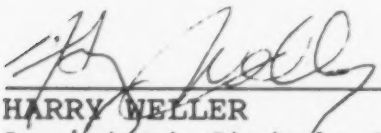
Given the complete rejection of this question by all circuits which have decided it, there is no need for further review by this Court. Rule 10.1(b).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the Connecticut supreme court should be denied.

Respectfully Submitted,

Respondent State of Connecticut

By 

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APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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APPENDIX A

Connecticut General Statutes

§53a-13. Lack of capacity due to mental disease or defect as affirmative defense.

(a) In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law.

(b) It shall not be a defense under this section if such mental disease or defect was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor or any drug or substance, or any combination thereof, unless such drug was prescribed

for the defendant by a licensed practitioner, as defined in section 20-184a, and was used in accordance with the directions of such prescription.

(c) As used in this section, the terms mental disease or defect do not include (1) an abnormality manifested only by repeated criminal or otherwise antisocial conduct or (2) pathological or compulsive gambling.

§53a-54a. Murder defined. Affirmative defenses. Evidence of mental condition. Classification.

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defen-

dant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent

to cause the death of another persor.

(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony.

§53a-55. Manslaughter in the first degree: Class B felony.

(a) A person is guilty of manslaughter in the first degree when: (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circum-

stance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection.

§759. Mental disease or defect inconsistent with the mental element required for the offense charged.

If a defendant intends to introduce expert testimony relating to a mental disease or defect, or another condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. He shall also furnish the prosecuting authority with

copies of reports of physical or mental examinations of the defendant made in connection with the offense charged, within five days after receipt thereof. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

§760. Psychiatric examination.

In an appropriate case the judicial authority may, upon motion of the persecuting authority, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the defendant in the course of any examination provided for by Sec. 757, whether the examination shall be with or without the

consent of the defendant, shall be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding. A copy of the report of the psychiatric examination shall be furnished to the defendant within a reasonable time after the examination.

§852. Necessity for requests to charge and exceptions.

The supreme court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of objection. Upon

request, opportunity shall be given to present the exception out of the hearing of the jury.

Rules of the Supreme Court of the United States

Rule 10. Considerations governing review on writ of certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the

same matter; or had decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Federal Rules of Criminal Procedure

Rule 12.2. Notice of insanity defense or expert testimony of defendant's mental condition.

(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Expert testimony of defendant's mental condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Mental examination of defendant. In an appropriate case the court may, upon motion of the attorney for the

government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceedings except on an issue respecting mental condition on which the defendant has introduced testimony.

(d) Failure to comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any

expert witness offered by the defendant on the issue of the defendant's guilt.

(e) Inadmissibility of withdrawn intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

APPENDIX B

Transcript

****

[3102] MR. BAILY: No exceptions, your Honor.

THE COURT: As given by the Court.

MR. BAILY: No exceptions.

THE COURT: Mr. Daly.

MR. DALY: Yes, your Honor. Before I begin with any exceptions, I would like to include the exceptions I made to your Honor's original charge where they are applicable. It may be that your Honor finds that an insufficient way to alert you to what I am complaining about, and if so, after I get through with the notes I've made here, I'll attempt to be more

specific. Maybe I ought to start and --

THE COURT: Pardon.

MR. DALY: Maybe I ought to be specific, and then maybe your Honor can decide whether or not you think that is specific enough or whether I should go back to the complaints I made about the original charges.

THE COURT: Why don't you proceed.

MR. DALY: All right. Well, in your Honor's charge on murder, I take exception to your Honor's failure to charge in accordance with my very first request which would have included the admonition to the jury that you [3103] are not required to infer intent from the accused's conduct. The burden o

proving intent beyond a reasonable doubt is on the state.

In addition, if your Honor pleases, in charging them on the question of intent, your Honor said, if I remember the sequence correctly, you can't look into a person's mind, and you then said, as I wrote it down, we must infer the intent from the surrounding circumstances since we can not look into his mind. I take exception to your Honor's failure to add at that time that the lack of intent should also or can also be inferred the very same way, from looking at all of the circumstances, those that precede the event, that took place during the event and that took place after it. In other words,

inference or inferences which they can use certainly can be used as well to determine there was no intent, as that there was intent, and I don't believe that is something that your Honor told them.

All right. I also want to take a general exception, and I am going to be more specific to your charging the jury that the burden of proving insanity was on the defendant, and [3104] that the burden of proving extreme emotional disturbance was on the defendant. I'll get to that in a minute.

Before I do, I'd like to except your Honor's failure to charge -- In reviewing these statutory claims with the jury, I'd

except to your Honor's failure to charge in accordance with my request number 5, and that is I instruct you if there is any conclusion available to you which is consistent with the innocence of the accused, that is a conclusion which you must reach.

Now, if your Honor pleases, as soon as you got through with the issue of whether or not murder had been proved, you went into the issue of mental defect or disease. Now, it seems to me that the manner in which you postured you remarks to the jury about mental disease or defect would have led the jury to believe that the only crime to which that was a defense is the crime of murder. Now, I appreciate,

however, that at the end of that charge on mental defect you said, if I remember correctly, something -- if you reach this conclusion, you should stop there because this is a defense to the commission of any [3105] crime, but then you went on to add, as I took it down, because that mental state negates the intent of his act. And again, it seems to me by your having said that to the jury, you're suggesting that the only crimes to which that would be a defense were those that require intent, and as you explained to them, I guess that would be murder and one part of manslaughter one.

Now, if your Honor pleases, you subsequently discussed with the

jury the question of extreme emotional disturbance. I would respectfully submit that the difference between extreme emotional disturbance and the so-called insanity defense is so sufficiently vague and unclear as to be unconstitutional, and I would think that the instructions -- I respectfully suggest that the instructions should have included the observation that insanity, obviously, includes those elements of which you discussed within emotional extreme disturbance, but insanity rises to the level where it strips the actor, even momentarily, of his or her ability control his or her conduct.

Again, if your Honor pleases,

when you [3106] discussed intent, both in connection with the second part of the manslaughter one statute and the murder statute, I respectfully suggest that the jury was given very few guidelines on this question of intent, and I would take exception to your Honor's failure to charge the jury that in order to find intent or in order to form intent, the actor or actors, in this case the defendant, would have to have the ability, the mental and emotional ability to form an intent, that the state would have to prove beyond a reasonable doubt that there wasn't any defect present or any other obstruction present which would have made it impossible for the

actor, in this case this defendant, to form an intent; and that that obligation is an obligation that is on the state, and that it's on the state beyond a reasonable doubt.

In discussing the third element of manslaughter one -- That is not correct. In discussing the third offense included within manslaughter one, that being the reckless business, while your Honor did explain some of those terms, I would respectfully suggest that your Honor did not mention that portion of the [3107] statute which deals with the actor or actors, in this case the defendant, being aware of the results of his or her consequences. And I would take exception to your Honor's failure

to charge that being aware of requires a mental state which would insure that in this ca se the defendant could appreciate the gravity, as you've already explained it to them, of the situation before him, and that this obligation to prove that the defendant could be aware of that is an obligation that rests on the State of Connecticut to prove beyond a reasonable doubt.

I think quite inadvertently, if your Honor pleases, while your Honor was giving them the summary- and I noted if that is of any help to either Mrs. Buscetto or you that it was at 12:37 on this clock when you said it. In summary when you summarized mental defect and

extreme emotional disturbance you said if you fail to find that those defenses were proved beyond a reasonable doubt, go on. Now, I think that was inadvertent on you Honor's part because earlier you did say to them clearly that it was the defense's obligation by a fair preponderance of the [3108] evidence to prove those. However, and as I am sure your Honor understands, I take exception to that too, but I certainly think it's the lesser of those two evils, the reasonable doubt business to which your Honor alluded in your summary.

Finally, if your Honor pleases, it strikes me that -- and I can't give you any authority--

that the manslaughter one statute which is almost a collage of crimes, one of which requires a specific intent, and the other which does not require any intent at all. Again, you know, those provisions are just sufficiently conflicting with one another as to be a violation of any defendant, in this particular case my defendant's constitutional rights. It just doesn't seem to me constitutionally permissible to have those absolutely opposite elements of a crime contained within the same statute.

Now, I would think, if your Honor pleases, that that includes all the exceptions that I have, and I would think it would include those that I made on Thursday when

your Honor instructed them; however, I left my notes back at my office, and I thought that

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[3111] negating, if proved, negating criminal responsibility, the Court feels that it adequately covered that in its instruction to the jury. You indicated a reference to your own exceptions or your request to charge on that same factor in your request to charge, and I think I did answer that not only after the first charge, but it would remain the same answer by the Court.

As to the fifth exception, the question of being unconstitutional, the Court has previously handled that section after the first

instruction to the jury.

The next exception I don't have with clarity. Could you reiterate that.

MR. DALY: I think the next one, if your Honor pleases, was that there was no instruction given by your Honor to the jury on the element of intent, and by that I meant to take exception to your Honor's failure to charge the jury that in order for the actor or actress to form an intent, that actor or actress would have to have mental ability to form such an intent, and that that is a matter that would have to be proved beyond a reasonable doubt, that that ability, the [3112] mental state of mind was present in the actor or

actress, in this case the defendant, at the time that the act was committed.

THE COURT: That I feel will be covered by the reinstruction on the question of inference to be drawn from the facts.

The seventh exception I will correct. I did go over the reporter's notes and I did indicate as to -- not the question of insanity defense, but as to the emotional disturbance defense, that the burden of proof was beyond a reasonable doubt.

As to your last exception, the Court believes the legislative power was to set the same type of level to three different methods of committing the charge of man-

slaughter in the first degree, and will not reinstruct on that.

MR. DALY: I would just like to add one thing. I think I said it on the record -- and I'll be through. On the question of intent and inference, my notes indicate that your Honor said we must infer -- We must infer intent from the surrounding circumstances, and all I am asking is that your Honor say to them you must infer intent or the lack thereof from...

****** [3113-3114] ******

[3115] ...[By The Court] emotional disturbance, the statute places the burden as to that affirmative defense on the defendant, and it's on the defendant by a fair preponderance of the evidence. At one

point I went over the Court Reporter's notes and I did lapse into in the summary that it had to be -- the extreme emotional disturbance had to be proved by proof beyond a reasonable doubt. The standard of proof by the defendant is placed on the defendant by a fair preponderance of the evidence as I've defined that term to you.

Now, in this connection, when you're considering the affirmative defense of sanity of insanity, this does not, the burden placed upon the defendant, diminish in any way the state's burden of proving each element of the crime either charged or the lesser included charges beyond a reasonable doubt; so the

burden is still on the state to rove each element of the charge and that's any charge, the one charge alleged or any lesser included charge, beyond a reasonable doubt.

And with those supplemental instructions, I'll ask you to continue deliberations.

(Whereupon the jury returned to the

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[3131][By The Court] The first possible verdict -- and this follows the sequence in which I've directed you in my instructions to follow. The first possible verdict is murder as charged. Now, I've indicated to you in my instructions that you must find each of the elements of murder beyond a

reasonable doubt in order to warrant a conviction of the first charge.

As to the second possible verdict, not guilty by reason of mental disease or defect, I've indicated to you in my instructions that the burden of proving that condition is on the defendant, and that is not by a fair preponderance of the evidence, but by -- I am sorry. Isn't beyond a reasonable doubt, but by the standard of fair preponderance of the evidence.

Now, as to that, however, you must consider that the condition known as insanity does apply to all criminal charges. So that condition of insanity being applied to all criminal charges, if found by you,

would apply to all criminal charges and, therefore, removes or negates the criminal responsibility of any criminal offense. It also must be applied to the question of whether or not the [3132] state has disproved the question of insanity where that is necessary.

So, when you're determining the question of not guilty by reason of mental decease or defect, first the burden is on the defendant to prove by a fair preponderance of the evidence that it does exist. And if that is found, then, of course, it's a finding of not guilty. And if, however, you find that you have a doubt as to a mental condition or insanity or the defendant's mental condition of

having mental disease or defect in that connection, the state has the burden of proving each element of the crime which would include that.

The next possible verdict is guilty of manslaughter in the first degree by virtue of extreme emotional disturbance. Again, I indicated that that is a burden of the defendant to prove that condition of the mind by a fair preponderance of the evidence, not by a standard beyond a reasonable doubt. Now, in this connection it only applies to the charge of murder. So, to consider that, you must have first found beyond a reasonable doubt each element of the charge of [3133] murder. Then if you determine by a fair prepond-

erance of the evidence that he acted under extreme emotional disturbance, it reduces the blame for murder to manslaughter in the first degree. So, in determining your third possible verdict, you will not consider the mental state of extreme emotional disturbance unless you first have determined beyond a reasonable doubt each element of the crime of murder. Only applies to the charge of murder.

The fourth possible verdict is manslaughter in the first degree as to intent to cause serious physical injury.

The fifth, manslaughter in the first degree with reckless indifference.

The sixth, manslaughter in the second degree by reckless conduct.

The seventh, guilty of criminally negligent homicide. All must be proved beyond a reasonable doubt in order to warrant a conviction.

And, of course, the eighth possible verdict is not guilty of any crime, that is murder or any lesser included crime under murder. And the eighth means that the state [3134] has failed to prove beyond a reasonable doubt any of the listed crimes.

If you have any questions concerning any of what I've just said, I expect another request.

Mr. Sheriff.

(Whereupon the jury was

excused.)

THE COURT: Mr. Appleton, any exceptions to the supplemental instructions as given by the Court.

MR. APPLETON: No, your Honor.

THE COURT: Mr. Daly?

MR. DALY: Well, if your Honor please, in your talking to the jury on their options under what you call the second and third verdicts, mental defect and extreme emotional disturbance, I except, as I did before, to your placing any burden whatsoever on the defendant, but with that exception --

THE COURT: On the same ground as previously --

MR. DALY: Yes.

THE COURT: And with that, the Court has already indicated its

response to Mr. Daly's exception to both those possible verdicts.

Court will stand in recess to await the . . .

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